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In the Supreme Court of the United States

OCTOBER TERM, 1982

MISSION INSURANCE COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The Federal Water Pollution Control Act, an important and comprehensive statute with a full legislative history, expressly established strict liability for oil spill cleanup costs subject to statutory limits of liability unless the spill was caused by willful negligence or willful misconduct. The question presented for review is whether the statutory liability and limit are exclusive or may the courts expand the statutory liability and limit by reference to a statutory "savings" clause inapplicable to those parties whose liabilities are delineated by the Act.

LIST OF PARTIES

The parties to the Fifth Circuit proceedings were the United States of America, Zito Towing, Inc. as owner of the M/V BIG SAM, and Mission Insurance Company. The Water Quality Insurance Syndicate filed a brief as *amicus curiae* in support of the petition for rehearing. The concerns affiliated with Mission Insurance Company are as follows:

Mission Insurance Group
Enterprise Insurance Company
Mission National Insurance Company
Holland America Insurance Company
Mission Reinsurance Corporation
Pacific Reinsurance Management Corporation
Sayre and Toso, Inc.
George S. Kausler, Limited
Sayre and Toso, Inc. of Louisiana
Sayre and Toso, Inc. of Illinois
Sayre and Toso, Inc. of Massachusetts
Carillon Managers International

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MISSION INSURANCE COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Mission Insurance Company, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on July 30, 1982.

OPINIONS BELOW

All of the opinions below are contained in the Appendices to the Petition for Certiorari. Appendix "B" is the Fifth Circuit's decision in *United States v. M/V BIG SAM*, 681 F.2d 432 (5th Cir. 1982), the judgment from which review is sought from this Court. Appendix "C" is the Fifth Circuit's denial of rehearing and rehearing *en banc*, published at 693 F.2d 451 (5th Cir. 1982). Appendices "D", "E", and "F" are the district court's opinions in *United States v. M/V BIG SAM* published at 454 F.Supp. 1144 (E.D.La. 1978), 480 F.Supp. 290 (E.D.La. 1979), and 505 F.Supp. 1029 (E.D.La. 1981).

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1982, and the timely filed petition for rehearing and rehearing *en banc* was denied on December 13, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions involved are 33 U.S.C. § 1321(f)(1),(g), and (h) which are set out in Appendix "A" in their form at the time of the incident in question.

STATEMENT OF THE CASE

On April 25, 1975, the Motor Vessel BIG SAM, a 155-ton towboat, collided with the Tank Barge BUTANE which was holed and discharged oil into the Mississippi River. The BIG SAM was owned by Zito Towing, Inc.

(Zito) and bareboat chartered and operated by Tri-Capt, Inc. The owner of the BUTANE commenced cleanup operations, and the United States completed the cleanup operations, expending $277,000. In the ensuing collision litigation, Tri-Capt, Inc. was found solely at fault. *Naptha Barge Co. v. Continental Navigation Co.*, Civil Action No. 75-1281, 1978 A.M.C. 501 (E.D.La. 1977). The issues involved in the collision litigation have been concluded and are not in dispute.

Following the conclusion of the collision litigation, the United States in 1978 initiated these proceedings to recover its oil removal costs. The Government brought suit in the United States District Court for the Eastern District of Louisiana* against Zito Towing, Inc. and Tri-Capt, Inc. *in personam* and the Barge BUTANE and Tug BIG SAM, *in rem.* Subsequently, Mission Insurance Company (Mission), the protection and indemnity insurer of the tug, was named as a party-defendant. The Government sought recovery based on the Federal Water Pollution Control Act, 33 U.S.C. §1321 (1972) (hereinafter referred to as the "FWPCA"); the Rivers and Harbors Act of 1899, 33 U.S.C. §407 (1899) (commonly and hereinafter referred to as the "Refuse Act"), and the general maritime law. Zito and Mission defended the suit on the grounds that the FWPCA provides the Government's exclusive remedy and limits recovery for negligent spills to $15,500, the applicable statutory limit in absence of willful fault.

The district court initially held that the Government was not limited to the remedies provided by the FWPCA, and could recover as well under both the general maritime

* Jurisdiction in the district court existed under the court's federal question jurisdiction, 28 U.S.C. § 1331.

law and the Refuse Act. *United States v. M/V BIG SAM,* 454 F.Supp. 1144 (E.D.La. 1978). See Appendix D. Subsequently, following the submission of additional memoranda by all parties, the district court vacated the previous ruling and held that the Government was limited to those remedies specified under the FWPCA. *United States v. M/V BIG SAM,* 480 F.Supp. 290 (E.D.La. 1979). See Appendix E. Following this ruling, the parties submitted the case for decision on stipulated facts. The district court entered judgment in the amount of $15,500 (the FWPCA statutory limit) in favor of the United States against Tri-Capt, Inc., the bareboat charterer and operator of the BIG SAM. All other claims were dismissed, and the Government's *in rem* claim was disallowed. *United States v. M/V BIG SAM,* 505 F.Supp. 1029 (E.D.La. 1981). See Appendix F.

Upon appeal by the United States, the United States Court of Appeals for the Fifth Circuit reversed, in part, the district court's judgment. The decision by Circuit Judge Tate held that the United States may recover the total cleanup costs under the general maritime law, notwithstanding the statutory limit. *United States v. M/V BIG SAM,* 681 F.2d 432 (5th Cir. 1982). See Appendix B. The Fifth Circuit affirmed the district court's ruling that the Government's claim under the Refuse Act was preempted by the FWPCA.

Petitions filed by Zito and Mission for rehearing and rehearing *en banc* were denied by the Fifth Circuit. *United States v. M/V BIG SAM,* 693 F.2d 451 (5th Cir. 1982). See Appendix C. Circuit Judge Gee, joined by Circuit Judges Brown, Rubin and Jolly dissented, stating the refusal to consider the case *en banc* "preserves a clear conflict in principle" within the Fifth Circuit. *United States v. M/V BIG SAM,* 693 F.2d at 459

Petitioner respectfully files this Petition for Writ of Certiorari to review the Fifth Circuit's decision, and to resolve the conflicts created by its construction of this important statute.

ARGUMENT

The BIG SAM decision disregards the legislative history, substitutes its own evaluation of policy considerations for that of Congress, and departs from established principles of statutory construction, thereby achieving a result contrary to prior holdings of this Court, and creating a conflict between circuits with respect to this important statute.

INTRODUCTION

During the 1960's, the demand for imported oil and petroleum products in the United States greatly increased. The consequent growth in the transportation of oil and petroleum products by sea inevitably led to larger tank vessels. The TORREY CANYON disaster and resulting pollution of the coasts of England and France in 1967 and the Santa Barbara oil spill in 1969 aroused public concern regarding the hazards of oil pollution and spurred the development of a comprehensive legislative program to deal with hazards relating to transportation of oil.[1] Congress responded to this public concern with the enactment of the Federal Water Quality Improvement Act of 1970,

[1] *See*, Water & Environmental Quality Improvement Act of 1970, H.R. Rep. No. 127, 91st, Cong., 1st Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 2691, 2692-93. A number of decisions contain expositions of the circumstances surrounding the development of this legislation. *See, e.g. United States v. Bear Marine Services*, 509 F.Supp. 710 (E.D.La. 1980); *United States v. Tug J.P. McALLISTER*, Slip Opinion, Civil Action No. 76-462 (D.P.R. April 3, 1980).

which amended and was incorporated within the Federal Water Pollution Control Act of 1948. 33 U.S.C. § 1161 (1970). Subsequently, this legislation was amended to include hazardous substances as a part of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1251, *et seq.*

Several decisions of this Court have noted the importance and comprehensive scope of this legislation. Shortly after its enactment, this Court noted that this statute "contains a pervasive system of federal control over discharges of oil." *Askew v. American Waterways Operators,* 411 U.S. 325, 330 (1973). In subsequent decisions dealing with the statute's provisions for the abatement of sewerage discharges, the Court has emphasized the comprehensive nature of this legislation. *Train v. City of New York,* 420 U.S. 35, 37; *Milwaukee v. Illinois,* 451 U.S. 304, 317-319 (1981); *Middlesex City Sewerage Authority v. National Sea Clammers Assoc.,* 453 U.S. 1, 21-22 (1981). In *Milwaukee,* the Court quoted Senator Randolph's description of the FWPCA as "perhaps the most comprehensive legislation in its field." *Milwaukee v. Illinois,* 451 U.S. at 318. Likewise, in the dissent to a denial of certiorari in a case involving the subsections relevant to the present case, Justice Rehnquist noted "the vital importance" of this legislation. *Hollywood Marine, Inc. v. United States,* 451 U.S. 994 (1981).

In enacting this legislation and this particular section (33 U.S.C. § 1321), Congress confronted a difficult legislative task. Congress had to consider major divergent and conflicting issues of national policy, centering on the importance of oil to the United States and the need to protect America's waters. The hearings and legislative process focused on multiple aspects of these national

issues—the need for oil, the recognition that oil would be transported by water, the consequences of both major and minor spills, the need to provide for prompt and proper cleanup, the evaluation of anticipated cleanup costs, the need to establish an effective remedy for recovery of cleanup costs, the need to protect and preserve maritime commerce from crushing liability, the insurability and cost of insurance for such cleanup liability, and the effect of cleanup liability and insurance costs on maritime commerce.[2]

In view of these conflicting policy considerations, not surprisingly the Senate and House of Representatives proposed conflicting and inconsistent legislative responses. In the portions pertinent to this litigation, the House bill proposed liability of dischargers and third parties for cleanup costs incurred as a result of a willful or negligent spill. This liability would be subject to a specific statutory limit. H.R. 4148, 91st Cong. 1st Sess., § 17(e). *See,* H.R. Rep. No. 127, 91st Cong. 1st Sess. *reprinted in* 1970 U.S. Code Cong. & Ad. News 2691 at 2701. The pertinent part of the Senate proposal would have imposed strict liability upon dischargers for cleanup costs subject to limits different from those in the House bill. The Senate proposal would also have allowed the United States recovery of all cleanup costs beyond the statutory limit upon proof that the discharge was caused by the discharger's negligence or willful act.[3] In

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[2] *See* S. Rep. No. 351, 91st Cong., 1st Sess. 5 (1969); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739-40 (5th Cir. 1980); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 617 (4th Cir. 1979).

[3] Sec. 12(f), Senate Amendment to H.R. 4148, *reprinted in* 1970 U.S. Code Cong. & Ad. News 2691 at 2721. The Senate bill did not address third parties, and its "savings" clause provided that the statutory liabilities of dischargers did not affect the right of dischargers or the United States against third parties, who were not covered by the statute. *Id.* at Section 12(l).

the legislative laboratory of the conference committee, the diverse and conflicting policy considerations and proposals were weighed and reweighed, and ultimately, the Federal Water Quality Improvement Act of 1970 was enacted.[4] Although the Senate proposal was rejected in Congress, the *BIG SAM* decision judicially resurrects the rejected Senate provision which would have allowed recovery of excess costs upon proof of ordinary negligence rather than the willful conduct required in the legislation.

This legislative compromise, distilled from multiple policy considerations, set up the following comprehensive liability scheme with regard to cleanup costs incurred by the United States:

> a) strict liability subject to statutory limits for dischargers and for third parties whose acts or omissions solely cause a spill,
>
> b) liability for costs in excess of statutory limits providing the United States can establish that the spill was caused by willful neglect or willful misconduct within the privity or knowledge of the discharger or third party. 33 U.S.C. § 1321(f),(g) (1972).

The FWPCA explicitly specifies the standard of liability, defenses, limits of liability and excess exposure for dischargers and for third parties whose acts or omissions solely cause a spill. The Act does not specify a liability scheme for other parties, that is, third parties whose acts *partially* cause a spill; however, Section 1321(h) provides that the liabilities established under the Act

[4] Pub.L. 91-224, § 102, 84 Stat. 91 (formerly codified at 33 U.S.C. § 1161), (subsequently recodified with the FWPCA Amendments of 1972 as 33 U.S.C. § 1321).

do not affect the rights of dischargers or the rights of the United States against third parties "whose actions may in any way have caused or contributed" to a spill. 33 U.S.C. § 1321(h) (1972). The Fifth Circuit relied upon this subsection in creating[5] a remedy to recover excess costs from third parties whose acts solely cause a spill and whose liability scheme is expressly specified in Section 1321(g).[6] In this holding, the Fifth Circuit has altered the statutory scheme and, in effect, nullified the Congressional compromise and balance achieved by the FWPCA.

I. IN HOLDING THAT SECTION 1321(h) PERMITS THE UNITED STATES TO PURSUE A GENERAL MARITIME TORT (NEGLIGENCE) CLAIM FOR RECOVERY OF CLEANUP COSTS IN EXCESS OF THE STATUTORY LIMIT PRESCRIBED IN SECTION 1321(g), THE *BIG SAM* DECISION IS CONTRARY TO THE APPLICABLE AND CONTROLLING DECISIONS OF THIS COURT IN *MOBIL OIL*

[5] As a previous panel of the Fifth Circuit had noted, the Government had never previously recovered oil spill cleanup costs under either the Refuse Act or common law. *United States v. Dixie Carriers*, 627 F.2d 736, 738 (5th Cir. 1980). Zito Towing, Inc. will expressly contest this holding of the BIG SAM decision in its petition to this Court.

[6] The Court's reliance on Section 1321(h)(2) is misplaced. Section 1321(h) was a creation of the Senate-House conference committee. It was an amalgamation of the Senate section 12(1) dealing with third parties *who were not included within the Senate's liability scheme* and the House Section 17(e)(2) which provided that the burden of proof specified in this bill did not affect the rights of dischargers against others "whose willful act or negligence may in some way have caused or contributed to the discharge." H.R. Rep. No. 127, 91st Cong. 1st Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 2720, 2721. Neither the House nor the Senate provision specified or preserved alternate or greater liabilities for those interests covered by this legislation. Nor did either bill attempt to preserve liabilities inconsistent with this section. *See* 33 U.S.C. § 1371(a)(1) (1972).

CORPORATION V. HIGGINBOTHAM AND *MILWAUKEE V. ILLINOIS*

In this litigation, the United States seeks to recover costs in excess of the statutory limit without proof of willful negligence or willful misconduct on the part of the operator of the Tug BIG SAM as required by 1321(g). The *BIG SAM* decision granted such recovery by reference to Section 1321(h)(2), which provides that the statutory liabilities shall "in no way affect any rights which...the United States may have against third parties whose actions may in any way have caused or contributed" to a spill. By virtue of Section 1321(h)(2), the decision suggests, a general maritime remedy may be utilized by the United States to recover additional removal costs without limitation[7] by the express provisions regarding third-party liability under Section 1321(g). In so holding, the decision effectively erases the statutory limitation and allows the excess recovery without the requisite proof of willful neglect or willful misconduct.

In recognizing the general maritime remedy and allowing this recovery, the *BIG SAM* decision is contrary to the principles announced by this Court in *Milwaukee v. Illinois*, 451 U.S. 304 (1981), and *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978). In *Milwaukee*, this Court undertook a thorough analysis of the scope of the point discharge permit program established under the FWPCA. Finding that Congress had thoroughly considered the issues surrounding the permit program and

[7] The Fifth Circuit's interpretation of Section 1321(h)(2) is in conflict with the interpretation suggested by the Second Circuit in *Matter of Oswego Barge Corp.* 644 F.2d 327, 341 (2d Cir. 1981) and with the interpretation of Judge Arceneaux in *United States v. Bear Marine Services*, 509 F.Supp. 710 (E.D. La. 1980). The interpretation of this subsection and this conflict are discussed in Section II, *infra*.

had enacted a comprehensive program and remedial procedure dealing with this issue, this Court held that the federal courts could not augment the statutory remedies with judicial remedies fashioned under the federal common law of nuisance. *Milwaukee v. Illinois*, 451 U.S. at 313-319. In so holding, this Court noted that the common law or judicial approach to national problems, which often produces a sporadic, piecemeal or case-by-case solution,[8] is particularly inappropriate when Congress has considered the question and enacted comprehensive legislation to address issues of national concern. *Id.* at 316-319, 325.

The principles in *Milwaukee* were reaffirmed in *Middlesex City Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981). Both the *Milwaukee* and *Middlesex* decisions disapprove of supplemental judicial or federal common law remedies despite arguments from claimants that such remedies were preserved pursuant to express savings clauses or legislative history. In *Middlesex*, this Court stated:

> In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA. As we stated in *Transamerica Mortgage Advisers, supra*, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 444 U.S. at 19, 62 L.Ed.2d 146, 100 S.Ct. 242. See also *Touche Ross & Co. v. Redington, supra*, 442 U.S. at 571-574, 61 L.Ed. 2d 82, 99 S.Ct. 2479. *In the absence of strong*

[8] *See, e.g. Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319 (1955).

> *indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropirate.*

453 U.S. at 15 (emphasis added).

Congress thoroughly considered the liability scheme for recovery of cleanup costs. At the time of this collision, the FWPCA limits of liability for dischargers and third parties were $100 per gross ton of the discharger's or the third party's vessel, or $14,000,000, whichever was less.[9] In setting these limits, Congress recognized that there would be occasions when the United States would not recover its full cleanup expenses and that those limits would need adjustment in accord with the dictates of experience once the statute was applied.[10] Nothing in the legislative history suggests that these limits were intended to be anything more or less than what they are—limits on liability.

The *BIG SAM* decision violates the principles announced in *Milwaukee*. In setting these limits Congress balanced conflicting policy considerations—the need to

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[9] See Appendix A. These statutory limits were subsequently raised by Congress in 1977. Clean Water Act of 1977, Pub.L. 95-217 § 58(d)(2), 91 Stat. 1566, 1595 (codified at 33 U.S.C. § 1321(f)(l)). In amending these limits, Congress expressed no concern or indication that alternative or cumulative remedies should be employed or recognized in favor of the United States to recover costs in excess of the statutory limits. *See, Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d at 617-618, n. 15.

[10] *See* note 9, *supra*. *See also United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739-40 (5th Cir. 1980); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 616-18 (4th Cir. 1979); *United States v. Tug J.P. McALLISTER*, Slip Opinion, Civil Action No. 76-462 at 16 (D.P.R. April 3, 1980), and comments of Senator Cooper, 116 Cong. Rec. 9003-04 and remarks of Representative Cramer, 116 Cong. Rec. 9327 (1970) and 115 Cong. Rec. 9020 (1969).

protect America's waters and provide an effective remedy for recovering governmental cleanup costs against the need to protect maritime commerce from potentially crippling liabilities which might not be insurable or might be insurable only at prohibitively expensive rates. In essence, the *BIG SAM* court reweighed those considerations despite the fact that Congress had already expressly addressed them. The court weighed the relative importance of deterring oil spills against the impact of additional liabilities upon third parties and concluded that the national policy of deterring oil spills was more important and should be fostered by allowing additional remedies.[11] The court's substitution of its policy choices for those of Congress was and is not within the proper purview of the federal courts in light of the Congressional enactment.

Recognizing that such determinations should be left to Congress, this Court has previously rejected an attempt to expand judicially the damages recoverable for a maritime wrongful death when such was already addressed by federal statute. *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978). In disallowing such an expansion of damages, this Court's language is particularly apposite to the instant dispute:

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High

[11] *United States v. M/V BIG SAM*, 681 F.2d at 443-444; *United States v. M/V BIG SAM*, 693 F.2d 454, n.8. If such policy determinations were proper, the BIG SAM interests could have introduced evidence in the lower court concerning the effect of such a decision on the BIG SAM owner and operator as well as evidence regarding the insurability of such a general maritime remedy and/or the costs of such insurance.

> Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages....The Act does not address every issue of wrongful-death law, but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless....
>
> Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements....There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries. Perhaps the wisdom we possess today would enable us to do a better job of repudiating *The Harrisburg* than Congress did in 1920, but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.

436 U.S. at 625 (citations omitted).

Section 1321(g) of the FWPCA explicitly specifies the limits of liability of a third party whose acts solely cause a spill. The *BIG SAM* decision ignores that Congressional pronouncement and expands the role of the federal courts beyond the boundaries articulated in the *Higginbotham* and *Milwaukee* decisions. Accordingly, petitioner respectfully submits that the *BIG SAM* decision is contrary to the applicable decisions of this Court and that a

writ of certiorari should be granted in accordance with Rule 17(c) of the Supreme Court Rules.

II. IN RECOGNIZING A GENERAL MARITIME RIGHT IN FAVOR OF THE UNITED STATES TO RECOVER CLEANUP COSTS IN EXCESS OF THE FWPCA LIMIT, THE *BIG SAM* DECISION CREATES A FUNDAMENTAL CONFLICT IN PRINCIPLE WITH DECISIONS OF THE SECOND, FOURTH AND NINTH CIRCUITS AS WELL AS WITHIN THE FIFTH CIRCUIT.

The *BIG SAM* decision deals with third party liability under Section 1321(g). The earlier Second, Fourth and Fifth Circuit decisions in *Oswego Barge, Steuart Transportation,* and *Dixie Carriers,*[12] respectively, dealt with the liability of a discharger under Section 1321(f). The discharger's liability and limits under Section 1321(f) are specified in terms virtually identical to the liability and limits of the third parties prescribed under Section 1321(g). Thus, although their liabilities arise under separate subsections, the statutory scheme—standard of liability, defenses, limitation, and excess liability—is identical for dischargers and for third parties who solely cause a spill.[13]

In its petition for rehearing *en banc,* petitioner urged that the *BIG SAM* decision was contrary to the earlier

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[12] *Matter of Oswego Barge Corp.*, 664 F.2d 327, 344 (2d Cir. 1981); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 614-18 (4th Cir. 1979); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739 (5th Cir. 1980).

[13] Indeed, the parallel between discharger and third-party liability was conceded by the *BIG SAM* court. *United States v. M.V BIG SAM,* 681 F.2d at 440-41.

Fifth Circuit decision in *Dixie Carriers* and to the decisions of the Second and Fourth Circuits in *Oswego Barge* and *Steuart Transportation*, respectively. The United States, in reply to the *amicus* brief, concurred in the request for a rehearing *en banc* and conceded that certain parts of the *BIG SAM* decision were in conflict with *Dixie Carriers*.[14] In denying rehearing and rehearing *en banc*, the panel stated that there was no conflict since *Dixie Carriers* (as well as *Oswego Barge* and *Steuart Transportation*) dealt with a discharger's liability, not third-party liability for which Section 1321(h)(2)[15] created an exception. The panel then reiterated its conclusion that a governmental right of action to recover excess cleanup costs under the general maritime law would not be inconsistent with the statutory remedy. *United States v. M/V BIG SAM*, 693 F.2d at 454-56.

The dissent to the denial of rehearing by Circuit Judge Gee, concurred in by Circuit Judges Brown, Rubin and Jolly, disagreed and noted the "fundamental conflict in principle" between the *BIG SAM* and *Dixie Carriers* decisions. *Id.* at 459. The dissent expressly recognized the patent inconsistency between the FWPCA remedy with its statutory limit and the general maritime remedy for excess costs without the requisite proof of willful misconduct or willful negligence. Because of this essential conflict between panel decisions, the dissent expressed the view that the denial of rehearing *en banc* had passed to the Supreme Court the duty to reconcile this intracircuit conflict. *Id.*

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[14] See United States' Reply to Original Brief of Amicus Curiae, Water Quality Insurance Syndicate in Support of Petitions for Rehearing and for Rehearing *En Banc* at vii.

[15] As noted earlier, this interpretation of this subsection is not supported by the legislative history. See note 6, *supra*.

The fundamental conflict is not, however, nestled within the confines of the Fifth Circuit. As noted above, the *Dixie Carriers* decision is in accord with the Fourth and Second Circuit decisions in *Steuart Transportation* and *Oswego Barge*.[16] In the former decision, the Fourth Circuit noted that the legislative history weighed against a preservation of other remedies and held that the statutory limit was to be the maximum cleanup cost recovery. *Steuart Transportation Co. v. Allied Towing Corp.*, 596 F.2d at 617. The *Steuart* court noted that judicial remedies inferred under the Refuse Act or under the general maritime law were inconsistent with the liability and limitation standards of the FWPCA and that recoveries under those remedies would nullify the limitation provided for by the statute. *Id.* at 618. Likewise, in *Oswego Barge*, the Second Circuit held that the preemptive scope of the FWPCA precluded a general maritime law remedy in favor of the United States. The *Oswego Barge* court stated that the FWPCA and general maritime law remedies were so inconsistent that permitting a judicial or general maritime law recovery would be tantamount to "rewriting the rule that Congress has enacted." *Oswego Barge*, 664 F.2d at 343, 344.

The Second Circuit in *Oswego Barge* specifically considered, without deciding, the effect and meaning of Section 1321(h)(2), the "savings" clause upon which the Government relies. The court expressed some uncertainty although its footnoted comments suggested possible agreement with the interpretation that Section 1321(h) applies only to *those parties or interests not covered by Sections 1321(f)* or *(g)*. *Oswego Barge*, 664 F.2d at 341. Such

[16] *See also Tug OCEAN PRINCE v. United States*, 584 F.2d 1151, 1162 (2d Cir. 1978).

parties or interests would be third parties whose acts or omissions contribute to or *partially* cause a spill. This was the interpretation given this section by Judge Arceneaux of the Eastern District of Louisiana in *United States v. Bear Marine Services*, 507 F.Supp. 710 (E.D.La. 1980). This interpretation conflicts with the *BIG SAM* decision which employs Section 1321(h) with reference to third party interests specifically covered under Section 1321(g). As noted earlier, the *Oswego Barge-Bear Marine* interpretation is consistent with the legislative history of the statute.[17] Section 1321(h) was "born" from a Senate proposal which was not directed at interests covered by the statute and from a House proposal which in no way expanded the third party's liability to the United States for cleanup costs.[18] The *BIG SAM* interpretation ignores the legislative history and distorts the Congressional liability scheme.

The *BIG SAM* decision is likewise in conflict with the Ninth Circuit decision in *United States v. City of Redwood City*, 640 F.2d 963 (9th Cir. 1981). There, the Ninth Circuit, while allowing a general maritime law claim for recovery of cleanup costs by the United States against non-vessel third parties, noted that the recovery sought by the United States was not in excess of the statutory limitation. *Id.* at 970. The court stated that the proof of willful negligence or willful misconduct was limited to situations where the United States sought recovery of costs in excess the limitation provided under Section 1321(g). *Id.* at 969. Accordingly, although *Redwood City* recognizes a general maritime remedy, it specifically limits that remedy in a fashion consistent with the statutory limitation set forth in Section 1321(g).

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[17] See note 6, *supra*.

[18] *Id.*

The dissent to the denial of rehearing *en banc* notes that the *BIG SAM* decision represents a "single-minded focus" on section 1321(h). *United States v. M/V BIG SAM*, 693 F.2d at 459. The *BIG SAM* decision ignores and effectively nullifies the limitation contained in Section 1321(g). This decision creates the fundamental conflict in principle with the decisions in the Second, Fourth and Ninth Circuits. Petitioner respectfully submits that this conflict warrants a grant of certiorari pursuant to Rule 17(a) of the Supreme Court Rules.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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NO.

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FILED
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

MISSION INSURANCE COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT VOLUME I—APPENDICES "A-F"

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APPENDIX "A"

Statutory Provisions

33 U.S.C. §1321(f)(1)(1972)

(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(2) of this section shall, not withstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for the removal of such oil or substance by the United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in any action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

33 U.S.C. §1321(g)(1972):

(g) In any case where an owner or operator of a

vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(2) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section, the liability of such third party under this subsection shall not exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent

jurisdiction to recover such removal costs.

33 U.S.C. §1321(h)(1972):

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) The United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

APPENDIX "B"

UNITED STATES of America
Plaintiff-Appellant,

v.

M/V BIG SAM, in rem, et al.,
Defendants-Appellees.

No. 81-3127
United States Court of Appeals,
Fifth Circuit.

July 30, 1982.

Rehearing and Rehearing En Banc
Denied Dec. 13, 1982.

Wendy M. Keats, Leonard Schaitman, Attys., Civ. Div., Appellate Staff, Dept. of Justice, Thomas W. Snook, Allen Van Emmerick, Civ. Div., Torts Branch, Dept. of Justice, Washington, D. C., for plaintiff-appellant.

Normand F. Pizza, New Orleans, La., for M/V BIG SAM and Zito Towing Co.

Thomas J. Wagner, Richard A. Sabalot, New Orleans, Louisiana, for Mission Ins. Co.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

The United States appeals from the dismissal of its suit against the Motor Vessel BIG SAM and its owner to recover oil spill cleanup costs. It is conceded that the sole fault of the accident was the negligent operation of the BIG SAM, which struck a tanker barge and caused the discharge of substantial quantities of oil. The district court held that liability for the cleanup costs was exclusively governed by section 311(g) of the Federal Water Pollution Control Act ["the Act"], 33 U.S.C. §1321(g), and that under this section the sole party responsible was the insolvent bareboat charterer of the BIG SAM.

We reverse, holding (1) that both owner and charterer of the sole-fault, non-discharging vessel are liable under §1321 (g), (2) that this statutory section does not exclude an in rem remedy, and (3) that any maritime tort remedy of the United States against the negligent vessel is not pre-empted by §1321 (g), in view of the express provision of 33 U.S.C. §1321(h)(2) that the liabilities established by the Act "shall in no way affect any rights which . . . the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance."

Factual Context of the Issues

The case originated out of a collision in the Mississippi River between the M/V BIG SAM and the T/B BUTANE, April 25, 1975, which resulted in hull damages to and oil spill from the BUTANE. The BIG SAM is a twin screw towboat, 155 gross tons, which at the time of the collision was owned by Zito Towing, Inc. and bareboat chartered by Tri-Capt, Inc. Due to negligent navigation

and an inexperienced pilot, the BIG SAM collided with the tank barge BUTANE, owned and operated by Delta Barge Line. The collision caused 280,000 gallons of oil to be discharged from the BUTANE. Delta Barge Line immediately began cleanup operations. After spending over $50,000 in cleaning up and protecting water intakes, Delta turned the operation over to the U. S. Coast Guard, which spend almost $300,000 more to finish cleaning up the spill.

The United States brought this suit against the BIG SAM (in rem), Zito (its owner), and Tri-Capt (the vessel's[1] bareboat charterer), alleging causes of action based upon §1321 (g) of the Act, the Refuse Act, 33 U.S.C. §407, and general negligence (maritime tort law), to recover its cleanup costs. The findings in litigation between the private parties were stipulated,[2] under which the sole

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[1] The United States initially also sued the BUTANE (the discharging vessel) and Delta, its owner and operator. The government does not complain of the dismissal of these parties from the suit, as exculpated from liability because the negligence of the BIG SAM was the sole cause of the collision. See Subsection 1321(f), quoted in note 5 below.

[2] See *Naptha Barge Co. v. Continental Navigation Co.*, 1978 A.M.C. 501, No. 75-1281 (E.D. La. 1977). In this suit, Delta (the owner of the discharging vessel BUTANE) recovered from Tri-Capt. (the bareboat charterer of the BIG SAM) damages, civil penalties paid to the Coast Guard under Subsection 1321(b), costs expended to protect water intake, and the initial and aborted cleanup costs incurred by Delta. The right to recover the latter is expressly recognized by Subsection 1321 (h), which provides

> The liabilities established by this section shall in no way affect any rights which (l) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or . . . .

The United States strongly argues that likewise its own cleanup costs were preserved by the remainder of this subsection 1321(h)(2), which similarly provides that the liability established in Subsection 1321 "shall in no way affect any rights which...(2) the United States

cause of the collision was the negligence of the BIG SAM, the non-discharging third-party vessel. The district court held that liability was determined exclusively by §1321(g); that under that section no in rem remedy against the vessel was recognized; and that under §1321(g) tri-Capt, the bareboat charterer (by now insolvent), was solely at fault and that it alone was thus liable in the amount of $15,500, the limit of liability under the circumstances as provided by §1321(g)[3]

The government contends that the district court erred in not affording an in rem remedy against the solely negligent vessel, and its holding that §1321(g) of the Act provided the exclusive remedy against a third-party non-discharging vessel solely at fault. Before reaching these contentions, we will set forth briefly an overview of sections of the Act relevant to the issues before us.

The Statutory Scheme

The issues before us on this appeal are essentially ones of statutory construction. Involved are not only what remedies were intended by Congress in passing the Act, but as well what remedies were foreclosed.

The Act, 33 U.S.C. §§1251-1376, was originally enacted as the Water Quality Improvement Act of 1970,

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(Footnote 2 continued)
Government may have against any third party whose actions may in any way have caused or contributed" to discharge.

[3] The district court's opinions to this effect are reported at 505 F.Supp. 1029 (E.D. La. 1981) and 480 F.Supp. 290 (E.D.La. 1979). These opinions reversed an earlier determination by the district court that the remedy provided by the Act was not exclusive. 454 F.Supp. 1144 (E.D. La. 1978).

Pub.L.No.91-224, with relevant provisions reenacted as part of the Federal Water Pollution Control Act Amendments of 1972.[4] The Act prohibits the discharge of oil into the navigable waters of the United States, 33 U.S.C. §1321(b)(l). The government is authorized to clean up any oil spill not properly removed by the discharger, 33 U.S.C. §1321(c)(l), including the emergency power to remove, and if necessary destroy, the discharging vessel, 33 U.S.C. §1321(d).

The Act imposes liability for cleanup costs on "dischargers," and cleanup costs incurred by the government are recoverable under §1321(f)(l),(2),(3)[5] from the

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[4] The Act as re-enacted in 1972 was applicable to this 1975 accident. Subsequent to 1975 the Act has been amended by the Clean Water Act of 1977, with additional amendments in 1978 and 1980. None of the amendments concern issues presented by this appeal.

[5] 33 U.S.C. Subsection 1321(f)(1)-(3) presently provides:

(f)(l) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be

discharging vessel or facility. If, however (as here), the sole

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(Footnote 5 continued)

recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000 except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility

cause of the accident is the act or omission of a third party, the government is permitted to recover its cleanup costs from such sole-cause third-party. §1321(g)[6]. The Act also

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(Footnote 5 continued)

from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

See also: Annot., A.L.R.Fed. 346 (1982).

[6] At the time of the accident in 1975, Subsection 1321(g) provided as follows:

(g) In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(2) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an actor omission in combination with an act of God, an Act of war, or negligence on the part of the United States. Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section, the liability of such third

expressly provides that the liabilities thereby provided "shall *in no way* affect any rights" that a discharging vessel or facility, *or the United States,* may have against any third party whose acts "may in any way have caused

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(Footnote 6 continued)

party under this subsection shall not exceed $100 per gross ton if such vessel or $14,000,000, whichever is lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

The subsection was amended in 1977 by Pub.L. 95-217, the Clean Water Act of 1977, in respects immaterial to the present action, including a sentence added to precede the subsection as originally enacted, as follows:

> Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles restores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection.

The legislative reports show that the latter amendment was adopted to assure "that the Government can pursue the insurer or the spiller to recover cleanup costs without awaiting final disposition of all third-party damage claims." S.Rep.No. 95-370 95th Cong., lst Sess. 64, reprinted in 1977 U.S. Code Cong. & Ad. News 4326, 4389

contributed to the discharge." §1321(h) (emphasis supplied).[7]

A primary issue of this appeal is the interrelationship between subsections (f), (g), and (h), with regard to the liability of a sole-cause non-discharging vessel. These subsections, as re-enacted in 1972 by the Act, are essentially the same as those originally enacted by section 11(f),(g), and (h) of the Water and Environmental Quality Improvement Act of 1970, Pub.L. 91-224, 84 Stat. 91. Committee reports[8] and debates relating to the enactment of these predecesor provisions have been considered as the source of the legislative history of these subsections (f),(g), and (h), although the 1972 committee reports also referred to them without illuminating expression.[9]

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[7] 33 U.S.C. Subsection 137(h) provides:

> The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

[8] The Conference Report No. 91-940 (to accompany H.R. 4148, which became the 1970 Act, Pub.L. No. 91-224), reprinted in [1970] U.S. Code Cong. & Ad News 2691, 2712, deals with the conference substitute section 11, which became section 11(f),(g) and (h) of the 1970 Act. The Conference Report merely restates the substance of the sections without illuminating explanation. *Id.* at 2724-26. As noted in the text, the present subsections (f),(g) and (h) retain essentially the same language as the 1970 Act.

[9] Section 311 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 816, essentially retained the existing law with regard to oil spills, but increased the maximum liability. The Conference Report No. 92-1236, reprinted in [1972] U.S. Code Cong. & Ad. News 3668, 3776, merely states without explanation (except as to changes in liability limits) the substance of section 311 of the 1972 Act (33 U.S.C. Subsection 1321), *id.* at 3810.

Subsection (f) imposes a strict liability standard under which the United States may recover from a discharger its cleanup costs up to stated limits without a showing of fault. The discharger may, however, escape this strict liability if he shows that the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States—or an act or omission of a third party. On the other hand, if the United States proves that the discharge "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner," the owner is liable to the United States for the full amount of the cleanup costs.

Subsection (g) comes into play when the discharger proves that the discharge "was caused solely by an act or omission" of a third party "*without regard to whether such act or omission was or was not negligent.*" If the discharger can so prove, then the third party is liable for cleanup costs up to stated limits (a strict liability, without fault)—in the case of a vessel, as of 1975 the statutory liability of the "owner or operator...shall not exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser." However, if the United States can prove that the discharge was "the result of willful negligence or willful misconduct within the privity and knowledge of such third party," then the United States may recover from the third party for the full amount of its cleanup costs. Subsection (g) (see note 6) does not expressly recognize an in rem remedy for cleanup costs as a maritime lien, as does subsection (f)(1) (see note 5) with respect to the discharging vessel.

Subsection (h) relates only to third parties whose acts "in any way" caused or contributed to the discharge. It provides that the liabilities established by the Act "shall in no way affect any rights" against such third party that

either the discharging vessel-facility or the United States may have.

Subsection (g), third-party liability.

The principal issue raised with regard to third-party liability is whether subsection (g) provides the exclusive remedy for the government's recovery of oil-spill cleanup costs. Before reaching that issue, however, we will first decide two subsidiary issues of statutory interpretation with regard to that subsection's imposition of strict (no fault) liability upon a third-party vessel whose act or omission was the sole cause of a discharge: (1) whether the Act contemplated that *either* the owner of the non-discharging vessel *or* the operator (the bareboat charterer) shall be so liable, or whether instead the statutory terms contemplate joint and several liability; and (2) whether subsection (g)'s silence as to an in rem remedy against a non-discharging third-party vessel, precludes an admiralty court from affording one to the government? No decision cited to us has touched upon these issues other than the opinion of the district court in the present case.

Liability of "owner or operator": Subsection (g), which emerged from the 1970 Congressional conference committee without explanation, speaks in terms of the liability of the "owner or operator" of the non-discharging third-party vessel. Noting that this liability is expressed in the disjunctive, the able district court interpreted it as "giving a choice of parties, depending on the existing facts." 505 F. Supp. at 1033. Finding that under the existing facts the only third-party whose act or omission caused the discharge was Tri-Capt (the bareboat charterer, in exclusive control of the vessel), the district court held that within the meaning of the statute that Tri-Capt was

the only third party whose act or omission had caused the accident.

In our opinion, the conclusion by the district court errs in regarding the term "owner and operator of a vessel" as disjunctively differentiating liability. This interpretation overlooks that the term "owner and operator" is a term of art in the statute that, as specifically defined therein, means "*any* person owning, operating, or chartering by demise" the vessel in question. 33 U.S.C. §1321(a)(6).[10]

As statutorily defined, the term "owner or operator" refers both to the owner and to the bareboat charterer, and thus in our opinion subsection (g) affords the government a remedy against either or both. Having in mind the intent of the Act to provide an effective remedy through strict liability for recovering cleanup costs from oil spills on navigable waters, it would seem that this construction is more consistent with the legislative purpose than one that would permit an offending vessel or its owners to insulate themselves from liability through a bareboat charter to, as here, an impecunious and uninsured charterer. See *United States v. Lebeouf Bros. Towing Company*, 621 F.2d 787 (5th Cir. 1980) (rejecting a similar attempt under subsection (f) to impose a third-party defense between the owners

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[10] Section 1321(a) provides as follows:

(a) For the purposes of this section [1321] the term—

. . . . . .

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

. . . . . .

of the *discharging* vessel (a tanker barge) and the tugboat (the alleged third party) towing it, on the basis that the act or omission of the tugboat was that of an interposed third party).

Section 1321(p) of the Act requires each vessel to maintain evidence of financial responsibility to meet the liability to which it could be subjected under §1321. Zito, the owner of the BIG SAM, argues that 46 C.F.R. §542.4(a), the federal regulation implementing §1321(p), now prevents the non-operating owner from applying for a certificate of financial responsibility and, therefore, from protecting its interest against oil pollution liability.[11] Although an applicant for such a *certificate* can establish evidence of financial responsibility in several ways, one of which is with insurance, 46 C.F.R. §542.8, nevertheless, while the regulation does not *require* the *owner* to secure vessel insurance, neither does it *prohibit* him from doing so. If the owner is assured that the operator has in fact secured such insurance, a matter of course allocable by contractual responsibility, then obviously it need not do so.

We therefore find that the liability of the owner and the operator under subsection (g) is not alternative but is instead joint and several.[12]

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[11] The regulation was changed in 1978 to allow only operators to apply for such a certificate. At the time of the collision 46 CFR. Subsection 542.4 allowed either the operator or the owner to apply for such certificate. The only complaints dealt with by the Federal Maritime Commission when the regulation was amended in 1978 had to do with the hampering of (1) "spot" or "trip" chartering and (2) the ability to contract for polllution liability if the owner could not apply for the certificate. The Commission found both arguments without merit. The ability to actually insure the vessel does not appear to have been affected by the regulation. See 43 Fed.Reg. 35704, 35706 (August 11, 1978).

[12] The government has not urged this issue of the owner's personal liability upon this appeal, although it disagrees with the district

(2) *In rem remedy against the non-discharging vessel:* In disallowing an in rem remedy, the district court persuasively noted: (a) while an in rem remedy is expressly recognized against the *discharging* vessel by subsection (f), subsection (g) is silent as to the availability of such a remedy against (as here) the non-discharging third-party vessel; (b) that, due to the exclusive remedy provided by the Act (a holding we disapprove below), no independent maritime tort has been created that would give rise to a maritime lien. 505 F.Supp. 1031-32.

As to (a), we should first note that the inclusion of in rem language in subsection (f) is indicated by the conference report as clarifying the existence of the remedy, not as creating it.[13] If the omission of similar clarifying language in subsection (g) was deliberate, the explanation well might be that in subsection (h)(2)(see note 7) the rights of the United States were expressly in no way affected as against any *third party* causing or contributing to the discharge. We are unable to find any Congressional intent in subsection (g) that no in rem remedy should be allowed as against a third-party non-discharging vessel that caused or contributed to the discharge.

As to (b), the decision of the issue under the present

(Footnote 12 continued)
court's ruling. The government is thus unable to obtain relief by personal judgment against the owner on remand.

We reach the issue, however, because a construction of subsection (g) as a whole is of assistance in determining the remaining issues raised by this appeal.

[13] See Conference Rept. No. 91-940, 91st Cong., 2d Sess, reprinted in [1970] U.S. Code Cong. & Ad. News 2691, 2724, where the committee stated: "The inclusion of specific language relating to the maritime lien and actions against the owner or operator are for the purposes of clarification only."

facts is clear. The sole fault of the accident causing the oil spill was the *negligence* of the BIG SAM. Under the Act, the United States may be responsible for removing the substance from the navigable waters unless it is determined that the removal will be done properly by the discharger. 33 U.S.C. §1321(c),(d). As stated in this context, "[n]egligent conduct causing loss to others constitutes a traditional maritime tort." *Matter of Oswego Barge Corp.*, 664 F.2d 327, 334 (2d Cir. 1981). "[T]he federal courts have held that oil pollution is a tort under general maritime law." Comment, Federal Water Pollution Control Act, 53 Tul.L.Rev. 1421, 1422 (1979). "Oil pollution in navigable waters has been deemed a tort for which the United States is entitled damages." *United States v. City of Redwood City*, 640 F.2d 963, 969-70 (9th Cir. 1981). See also *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652,672 (1st Cir. 1980).

Thus, even if subsection (g) of the Act provides an exclusive remedy (which below we hold it does not), the damages caused to the United States (its cleanup costs)—even if (as we below reject) subject to the liability limits of the Act—result from a maritime tort, as least when caused by the negligence of a non-discharging vessel on the navigable waters.

A maritime lien, necessary as a prerequisite for the in rem action, Gilmore & Black, *The Law of Admiralty*, §l-12 at 35, §9-19 at 622 (2 ed. 1975), may arise out of a tort claim against a vessel, *id.*,, §9-2, at 587-89. 2 *Benedict, Admiralty*, §ll at 1-58-1-59 (7th ed. 1981). Suit may be brought against the vessel in rem in the proceeding to enforce the lien. Gilmore & Black, *supra*, §9-3 at 589-90. Tort liens may arise against a vessel even when it is under the control of persons neither the owner nor the owner's agents, including that of a bareboat charterer. *The Barnstable*, 181 U.S. 464, 21 S. Ct.

684, 45 L.Ed. 954 (1901); *The China v. Walsh*, 74 U.S. (7 Wall.) 53 19 L.Ed. 67, 73(1868); see also, *Baker v. Raymond Intern., Inc.*, 656 F.2d 173, 183-84 (5th Cir. 1981); *Grigsby v. Coastal Marine Service*, Inc., 412 F.2d 1011, 1030-31 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033, 90 S.Ct. 612, 24 L.Ed.2d 531 (1970).

Thus, the statutory no-fault remedy of limited liability provided by subsection (g) is here grounded also upon sole negligence of the non-discharging third-party vessel. We see no reason why, at least as to a negligent third-party non-discharging vessel, the United States may not exercise an in rem remedy under the general maritime law to recover oil pollution cleanup costs incurred as a result of conduct that constitutes a maritime tort, even though subsection (g) might limit the recovery whether or not the sole-cause act or omission was tortious under the present facts. We need not here decide whether the United States likewise has an in rem remedy when the sole-cause act or omission did not constitute negligence.

Subsection (g): Exclusive Remedy for Government's Recovery of Oil-Spill Cleanup Costs against Negligent Third-Party Non-Discharging Vessel?

Subsection (f) relates to oil-spill liability of discharging vessels or facilities, and subsection (g) relates to such liability for third parties whose act or omission is the sole cause of the discharge. In virtually identical terms (see notes 5 and 6), these subsections provide for (a) strict (no fault liability up to stated limits (excusable only by the intervening sole cause of a limited specified nature) and (b) full liability for all such costs if the discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the discharger or third party. By reference to the legislative

history, the government persuasively argues that the specification of these two new remedies was not intended to exclude other remedies available for the recovery of damages (costs of cleanup) caused by oil-spill, such as for those through simple negligence (a maritime tort) of a vessel without the owner's privity or knowledge, where the owner's liability is limited to the value of the vessel and its freight, see 46 U.S.C. Subsection 183(a).

With regard to subsection (f), relating to liability of a discharging vessel, this argument has been rejected by this and other courts. The appellee vessel and owner strongly argue that similar reasoning requires a similar interpretation of the identical language of subsection (g), relating to the liability of a non-discharging sole-cause third-party vessel. For reasons to be explained, we find that as to *third-parties* any Congressional intent to provide subsection (g) as an exclusive remedy for the United States is negated by the express provision of subsection (h)(2)that the liabilities provided by Subsection 1321 "shall in no way affect any rights which . . . the United States Government may have against any third party."

Preliminarily, we note the rationale of the decisions that held that subsection (f) was *implicitly* intended to provide the exclusive remedy against discharging vessels for the government's recovery of its oil-spill cleanup costs. As summarized by this court in *United States v. Dixie Carriers, Inc.*, 627 F.2d 736,739 (5th Cir. 1980):

Although the express language of the statute provides little guidance to indicate Congress' intent the structure of the remedies in section 1321(f)(1) suggests that Congress intended for those statutory remedies to be exclusive. The statute allows the government to recover only a limited

amount of its cleanup costs under a strict liability theory. The government can then obtain additional, unlimited recovery of its cleanup costs only if it can prove willful negligence or willful misconduct with regard to the discharge.

Congress' intent to achieve a balanced and comprehensive remedial scheme in section 1321(f)(1) by matching limited recovery with strict liability and unlimited recovery with proof of willful conduct is apparent from the legislative history. The original Senate bill allowed the government an unlimited recovery upon proof of simple negligence. S.Rep. No. 91-351, 91st Cong., 1st Sess. (1969). The House of Representatives bill limited the government's recovery even upon proof of a willful discharge. H.R. Rep. No. 91-127, 91st Cong., 1st Sess. (1969), reprinted in [1970] U.S. Code Cong. & Admin. News, p. 269.1. The final statute allowing only limited recovery under a strict liability theory and allowing an unlimited recovery only upon proof of willful conduct represents a compromise between the two proposed statutes. See H.R. Conf.Rep.No. 91-940, 91st Cong., 1st Sess. 30-39 (1969), *reprinted in* [1970] U. S. Code Cong. & Admin. News pp. 2712-28.

In enacting a compromise bill that limits the government's recovery for cleanup costs in all cases except those involving willful discharges, Congress apparently intended to deter oil spills and recover cleanup costs in a manner that would protect most vessel owners from potentially crushing liability.

A similar conclusion has been reached by the Second and Fourth Circuits. *In re Oswego Barge Corp.*, 664 F.2d 327, 344 (2d Cir. 1981); *Steuart Transportation Co. v. Allied Towing Corp.*, 596 F.2d 609, 614-18 (4th Cir. 1979). *See also*: Comment, Federal Water Pollution Control Act, 53 Tul.L.

Rev.1421 (1979); *contra*, Note, Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs, 93 Harv.L.Rev. 1761 (1980).

However, at this point we must note that a facet of the reasoning was that the Act itself did not show any intent to permit other remedies against the *discharger* than those stated by subsection (f). In *Dixie Carriers, supra*, we expressly noted, with regard to other remedies against third parties,

> Section 1321(h)(2) states that the FWPCA [the Act] does not affect the rights which the United States may have against a third party whose actions caused an oil spill. See *United States v. LeBeouf Brothers Towing Co.*, 621 F.2d 787 (5th Cir. 1980) third party defense under section 1321(f)(1) for oil spill from barge does not extend to tug towing barge at time of spill). No such express language allows the government to recover its cleanup costs under the Refuse Act or common law. 627 F.2d at 742. *See also Oswego Barge, supra*, 664 F.2d 327 at 341 n. 19.

In holding that the Act provides an exclusive remedy as against the *discharger*, *Oswego Barge* contained a thoughtful and well-reasoned discussion of the criteria for gauging whether the Act had pre-empted (as against the *discharger*) other causes of action there asserted, which included both the maritime tort (simple negligence) and the Refuse Act actions, both here presently asserted by the United States against the present *third party non*-discharging vessel. See especially 664 F.2d at 335-39. We see no need to reiterate the detailed reasoning of that opinion but we here note and adopt the salient features of that decision's

excellent analysis of the applicable criteria as to whether the Act [referred to as the "FWPCA" in that opinion] had preempted other statutory or judge-made maritime law remedies.

> With respect to non-maritime federal common law, the Court recently articulated a strict test for determining the pre-emptive effect of a federal statute. *City of Milwaukee v. Illinois*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981). Instead of inquiring whether "Congress ha[s] affirmatively prescribed the use of federal common law," *id.* 101 S.Ct. at 1791, we are to conclude that federal common law has been preempted as to every question to which the legislative scheme "spoke directly," and every problem that Congress has "addressed." *Ibid.*

664 F.2d at 335.

> The Supreme Court has recognized, however, that the federal judiciary has a more expansive role to play in the development of maritime law than in the development of non-maritime federal common law. [Citations omitted.]

664 F.2d at 335-36.

> In recognizing a substantial law-creating function for federal courts in maritime law, the Supreme Court appears to have applied the presumption of statutory preemption somewhat less forcefully to judge-made maritime law than to non-maritime federal common law. [Citations and discussion omitted].

664 F.2d at 336.

> Ultimately determining whether non-statutory maritime law, as to both liabilities and remedies, survives enactment of a statute requires a careful analysis of several factors that the Supreme Court has considered relevant in assessing whether the presumption of preemption has been overcome. *Any terms of the statute explicitly preserving or reempting judge made law are of course controlling, as is clear evidence of Congressional intent to achieve such results.* In the absence of clearly expressed legislative intent, legislative history may provide useful guidance. (Emphasis supplied).

664 F.2d at 338-39.

Applying these criteria, we will for reasons stated below find that subsection (g) of the Act did *not* preempt or exclude a remedy in simple-negligence maritime tort, subject to statutory limitation of liabilities, 46 U.S.C. Subsection 183(a); but that it *did* exclude any potential remedy of the United States under the Refuse Act against the third party *non*-discharging vessel.

Subsection (h)(2): Express Preservation of Judge-Made Maritime Tort Remedy to Recover Damages Caused by Oil Spill?

As noted in *Oswego Barge*, "[a]ny terms of the statute explicitly preserving or preempting judge-made law are of course controlling," 664 F.2d at 339. Although no such preservation is evidence by the statutory language with regard to the liability of *dischargers* to the United

States, subsection (h)(2) unequivocably states that "[t]he liabilities established by this section [1321] shall in no way affect any rights which...the United States Government may have against any *third party* whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." The legislative history of this provision, which first appeared in the 1970 predecessor provisions of the Act that establishes the present statutory scheme for recovery of oil-spill cleanup costs, affords no reason not to read this statute according to its unambiguous expression.[14] Thus, as against third parties causing or contributing to an oil spill, the United States may assert other causes of action than those established by subsection (g), or at least any others that are not inconsistent with the remedies thereby provided.

If the BIG SAM's negligence was a concurring in-

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[14] 33 U.S.C. Subsection 1321(h) was enacted by the Water and Environmental Quality Improvement Act of 1970, Pub.L. No. 91-224, 84 Stat. 91.

This subsection was subsection 12(1) of Senate Bill 7, which stated that

> (1) The liability established by this section shall in no way affect any rights which (1) the owner or operator of a vessel, an onshore or offshore facility, or an onshore or offshore drilling-production facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil.

115 Cong.Rec. 28949 (1969). The conference substitute retained this provision in section 11(h). Conference Rept. No. 91-940, *supra*, note 15. [1970] U.S. Code Cong. & Ad. News at 2726.

The Federal Water Pollution Control Act Amendments of 1972, P.L. No. 92-500, 86 Stat. 816, retained unchanged subsection (h), but with the addition of the final phrase, "or hazardous substance." See reprinted in [1972] U.S. Code Cong. & Ad News 951, 1014.

stead of sole cause of the accident, no statutory provision of the Act applies to prevent the government's recovery of the non-discharging vessel's apportioned share of the oil-spill cleanup-cost damage occasioned by its contributing negligence. *United States v. City of Redwood City*, 640 F.2d 963, 969-70 (9th Cir. 1981). We can see no functional reason, nor does the legislative history afford any suggestion of such a purpose, that the government's remedy against the negligent third party vessel should be less because that negligence was the sole instead of merely a contributing cause of the accident.

The government here asserts two causes of action beyond those provided by subsection (g):(1) a maritime tort action, based upon the negligence of the BIG SAM, and (2) an alleged implied action for violation of the Refuse Act. We now turn to these two causes of action alleged:

(1) *Maritime Tort:* As we previously noted, under traditional maritime principles, negligent conduct on the navigable waters that causes loss to another constitutes a maritime tort. *See, e.g., Oswego Barge, supra*, 664 F.2d at 334, 343-44. "Oil pollution in navigable waters has been deemed a tort for which the United States is entitled damages." *United States v. City of Redwood City*, 640 F.2d 963, 969-70 (9th Cir. 1981). Even prior to the enactment of the 1970 predecessor of the present Act, at least one federal district court had recognized a cause of action in maritime tort in favor of a state government for damages caused by an oil discharge into the state territorial waters. *State of California, etc. v. S.S. Bournemouth*, 307 F.Supp. 922, 926-28 (C.C.Cal. 1969). We have little doubt that, even prior to the 1970 enactment, had the United States brought an action to recover damages by way of cleanup costs, recovery would have been allowable under maritime law for a mari-

time tort. See Comment, *supra*, 53 Tul.L. Rev. at 1422-23; Note *supra*, 93 Harv.L.Rev. at 1770-72.

Before us, the government only raises the issue of whether, by virtue of subsection (h)(2)'s express preservation, it is permitted to assert its cause of action in maritime tort against the BIG SAM and its owner, to recover damages to the government (the oil-spill cleanup costs) caused solely by the BIG SAM's negligence, under circumstances where the conduct occurred without the privity or knowledge of the owner-so that the owner is entitled to the limitation of personal liability provided by 46 U.S.C. §183(a) of no more than the value of the vessel and its freight.[15] We have little hesitation in declaring that such a remedy is not inconsistent with the remedy provided by subsection (g). See *United States v. City of Redwood City*, 640 F.2d 963, 970 (9th Cir. 1981). The allowance of the remedy thereby permitted does not thwart any Congressional purpose of the Act to protect vessel owners from potentially crushing liability and from an uninsurable risk, since the vessel is so liable and insurable to those limits

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[15] From a reading of the House debates on the Conference Report No. 91-940, on H.R. 4148 (which ultimately became the 1970 Act), it is apparent that Congress was aware of additional remedies that might be subject to the limitations of 46 U.S.C. Subsection 183(a). For instance, Congressman Cramer, a leading manager of the legislation, states that

> It should be borne in mind that this limitation of liability is solely for cleanup costs by the United States and does not propose to limit liability that might be imposed by State law or that exists under common law....
>
> If there are charges that another government would wish to make, say in the case of a spill that involved both the United States and Canada, or if there are charges or damages due to third parties under admiralty law or common law, these would be in addition and would not be subject to our limitation of liability.
>
> 116 Cong. Rec. 9326-27 (1970) (remarks by Rep. Cramer).

since the vessel is so liable and insurable to those limits against recovery of damages caused by maritime torts, whether the present one or others.

We expressly do not reach two issues, unnecessary for us to decide under present facts: (1) whether a maritime tort not subject to the limitation of liability because of the owner's knowledge or privity would be inconsistent with the remedy provided by the Act for willful conduct or willful negligence; and (2) whether the maritime tort remedy provides a recovery that is cumulative to or concurrent with the remedy provided by subsection (g).[16]

(2) *The Refuse Act:* Section 13 of the Rivers and Harbors Act, 33 U.S.C. §407 (commonly referred to as the "Refuse Act") prohibits the discharge of the "refuse matter" (which has judicially been interpreted to include oil) from any vessel into the navigable waters of the United States. The United States argues that a civil remedy action is implied by that statute, and it seeks recovery on that basis also.

With regard to the remedy against the discharger, the courts have consistently held that any Refuse Act remedy for cleanup damages is inconsistent with the remedy against discharger provided by the subsection (f) and is therefore preempted by that latter statute. *Oswego Barge, supra,* 664 F.2d at 343; *Dixie Carriers, supra,* 627 F.2d at 740. The essential reasoning is that any such strict liability remedy held to be implied by the Refuse Act, would provide

[16] If cumulative, the government might recover both the subsection (g) limits and the limitation-of-liability limits, where its actual cost exceeded the highest of the two. If concurrent, the United States would recover only the higher of the two limits. Here, however, the record indicates that the value of the vessel is substantially greater than the $300,000 cleanup-cost damages sustained by the government.

recovery of damages without limitation, while subsection (f) in providing strict (no fault) liability provides for specified limits.[17]

For identical reasons, we affirm the district court's conclusion that subsection (g), providing for strict liability in limited amount against a faultless third-party causing the accident, is inconsistent with the no-limitation strict liability remedy to be implied from the Refuse Act.

Conclusion

Accordingly, we AFFIRM the district court's dismissal of the United States claim insofar as based upon the Refuse Act; but we REVERSE the dismissal of the government's maritime tort claim and the district court's disallowance of an in rem remedy for the subsection (g) cleanup-cost damages resulting from the BIG SAM's negligence. The case is remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

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[17] See *Oswego Barge, supra*, 664 F.2d at 343:

> To whatever extent judge-made remedies for violation of the Refuse Act include recovery for cleanup costs based on strict liability, such remedies would be plainly inconsistent with the FWPCA because the strict liability remedy of the FWPCA is subject to dollar limitations while recovery of damages under the Rivers and Harbors Act of 1899, when permitted at all, is not subject to the limits of the Limitation Act, *University of Texas Medical Branch v. United States*, 557 F.2d 438 (5th Cir. 1977), cert. denied, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978); *In re Chinese Maritime Trust Ltd.*, 478 F.2d 1357 (2d Cir. 1973), cert. denied, 414 U.S. 1143, 94 S.Ct. 894, 39 L.Ed.2d 98 (1974). Allowing the Government a judge-made damage remedy without limits in strict liability under the Refuse Act would amount to "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp., supra* [436 U.S. 618 at 625, 98 S.Ct. 2010 at 2015, 56 L.Ed.2d 581 (1978).]

APPENDIX "C"

UNITED STATES of America,
Plaintiff-Appellant,

v.

M/V BIG SAM, in rem, et al.,
Defendants-Appellees.

No. 81-3127.

United States Court of Appeals,
Fifth Circuit.

Dec. 13, 1982.

Wendy M. Keats, Leonard Schaitman, Thomas W. Snook, Allen Van Emmerik, Dept. of Justice, Civ. Div., Washington, D.C., for plaintiff-appellant.

Normand F. Pizza, New Orleans, La., for M/V Big Sam and Zito Towing Co.

Leonard N. Bouzon, Thomas J. Wagner, Richard A. Sabalot, New Orleans, La., for Mission Ins. Co.

Machale A. Miller, New Orleans, La., for amicus Water Quality.

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 30, 1982, 5 Cir., 1982
681 F.2d 432)

Before WISDOM, RANDALL and TATE, Circuit Judges.

PER CURIAM:

The principal issues of this appeal relate to the proper statutory construction of section 311(g), (h), Federal Water Pollution Control Act, 33 U.S.C. § 1321(g), (h). *See* panel opinion at 681 F.2d 432. The focus of the defendant parties' applications for rehearing is the alleged inconsistency of the panel's interpretation of these subsections (g) and (h), with prior interpretations of subsection (f), section 311(f), 33 U.S.C. § 1321(f). The panel adheres to its construction of subsections (g) and (h), as based on the unambiguous statutory language that presumably reflects the unambiguous Congressional intent —especially since the legislative history gives no reason to doubt that the legislative words mean precisely what they say. Even assuming that the alleged inconsistency between subsection (f) and (g) is illogical,[1] it is for Congress to correct the syllogism, not the courts.

I.

Subsections (f), (g), and (h) relate to liability for the costs of removing pollution of navigable waters of the United States caused by the discharge of oil or hazardous substances. Subsection (f) provides that the *discharger* will be liable without fault but only up to a limited amount specified by statute,[2] except where the discharger can

[1] The panel does not, however, concede that this inconsistency is irrational or beyond the Congressional purview in the enactment of this complicated legislation compromising conflicting interests. *See, e.g.*, note 8 *infra*.

[2] However, the discharger will be liable to the full amount of

prove that the sole cause of the discharge was, *inter alia*, "an act or omission of *a third party* without regard to whether any such act or omission was or was not negligent." Subsection (g) similarly provides for strict (no fault) liability in limited amount for such sole-cause third party, with similar exceptions. Subsection (h) provides, however, that the liabilities established by the Act "shall *in no way* affect *any* rights" that the United States or other persons "may have against any third party whose acts may in any way have caused or contributed to such discharge."

The uncontroverted facts before the court show: The defendant vessel, BIG SAM, collided with a tank barge and caused an oil spill to be discharged from the latter. The sole cause of the collision was the negligence of BIG SAM, the non-discharging third-party vessel. BIG SAM and its owners contended that their exclusive liability for the cleanup costs was provided by the sole-cause strict liability provisions of subsection (g), under which (based on BIG SAM's 155 gross tons) liability was limited to $15,500. The panel held, however, that BIG SAM—undoubtedly liable as the "sole cause" third party, irrespective of negligence, under subsection (g)—was subject to liability for the damages[3] caused by its *negligence* and thus that subsection (g) "sole [no fault] *cause*" liability was not exclusive and did not relieve BIG SAM and its owners of their liability[4] under ordinary maritime tort principles. The

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(Footnote 2 continued)
clean up costs where the discharge is "the result of willful negligence or willful misconduct within the privity and knowledge of the owner." Subsection (f).

[3] Subject, however, to the limitation of liability provided by 46 U.S.C. § 183(a).

[4] Since the value of the vessel was greater than the $300,000

panel so concluded, because of the unambigious provision of subsection (h)(2) that the liabilities established by the Act

> *shall in no way affect* any rights which...the United States Government may have against any third party whose actions *may in any way have caused OR contributed* to the discharge of oil or hazardous substance. (Emphasis and boldface added.)

That the construction given by the panel to subsection (h) reflects its literal and unambiguous meaning is scarcely questioned by the rehearing applicants or the dissent from denial of an en banc hearing. Furthermore, the rather scant committee reports concerning the provisions of the Act, as hammered out by a conference committee compromising conflicting approaches and interests, are silent of any reason to believe the words do not mean what they say. Nor has anything in the legislative history or debates called to our attention any concern about relieving nondischarging third parties of their liability under maritime tort principles for their negligence;[5] these

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(Footnote 4 continued)
cleanup costs demanded, the panel did not reach the issue of whether the maritime tort and the subsection (g) strict liabilities against the third party are concurrent (so that the United States may recover only the greater of the two amounts) or instead cumulative. 681 F.2d at 444 and n. 16.

[5] The concerns at which attention were primarily directed in these sources were to the liabilities of *dischargers*, subject to crushing potential liability against which insurance could not be procured because of the day-to-day exposure to risk of discharge in the transportation of oil and other hazardous substances. These concerns did not necessarily implicate any inability of vessels not engaged in such trade to secure insurance for tort damages resulting from collision with another vessel, whether or not it carried oil; or with crushing personal liability of the tort-causing vessel's owner in excess of the insurance limits, for these

sources reflect to the contrary, if anything.

Instead, the panel's construction is attacked as being inconsistent with the judicial construction given almost identical language in subsection (f) concerning the strict liability of *discharger* itself. In *United States v. Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980), a panel of this court held that, with regard to a discharger—admitting that "the express language of the statute provides little guidance to indicate Congress' intent," 627 F.2d at 739—subsection (f) provided the exclusive remedy for the government to recover cleanup costs, and that a remedy against the discharger for ordinary negligence in maritime tort seems to have been excluded "by a balanced and comprehensive remedial scheme in section 1321(f)(1) by matching limited recovery with strict liability and unlimited recovery with proof of willful conduct." *Id.* In support of this ultimate conclusion, however, *Dixie Carriers* pointed out instances in the Act where other specific remedies were allowed—including that the Act "does not affect rights which the United States may have against a *third party* whose actions caused an oil spill," citing subsection (h), 627 F.2d at 742—and pointed out that, as against a discharger, "[n]o such express language allows the government to recover its cleanup costs under the...common law."[6] 627 F.2d at 742. Thus, in *Dixie Carriers* we in part relied upon subsection (h)'s provision, expressly preserving maritime tort remedies as against third parties (without an equivalent preservation against dischargers), as supporting

(Footnote 5 continued)
owners were already protected from such excessive exposure by the limitation of liability act, 46 U.S.C § 183(a).

[6] Earlier in its discussion, the court had referred to the remedy sought as being under "common law maritime tort" theory. 627 F.2d at 741.

the construction that such maritime tort remedies were *not* preserved but were instead supplanted as against *dischargers* themselves by the strict-liability remedy of subsection (f).

The panel thus perceives no inconsistency in the respective constructions given by it to subsections (g) and (h) and by *Dixie Carriers* to subsection (f), given the different and additional statutory provision expressly applicable to third parties alone by subsection (h) and expressly relied upon both by this panel and by *Dixie Carriers* in explaining their respective constructions of subsections (f) and (g).

II.

The complaint as to the panel's construction of subsections (g) and (h) is thus not directed to any error in construing or overlooking unambiguous language of the statute, nor is it in truth directed at any inconsistency between our holding and that in *Dixie Carriers*.

The complaint, rather, is that Congress was inconsistent in providing an exclusive strict liability remedy against dischargers by subsection (f) (if correctly construed by *Dixie Carriers*, which admitted the ambiguity of the statute in that regard[7]), but in permitting against negligent third parties a maritime tort remedy as well (whether

[7] The government, conceding the panel decision to be correct, asked for rehearing en banc in order to overrule *Dixie Carriers*, as affording a construction of subsection (f) that was inconsistent with the present panel's of subsection (g). At least the members of the panel felt that it would be inappropriate to reconsider *Dixie Carriers* where no litigation against a discharger was at actual issue and that, besides, Congress may well have intended to treat discharger and third party differently in that regard, as indicated in *Dixie Carriers*. *See* note 8 *infra*.

concurrent or cumulative, *see* note 4 *supra*). We who are not Congressmen might think it is illogical to permit the Act's strict liability remedy to supplant maritime tort remedies against a negligent discharger who created the bulk of the risk, but not against a negligent non-discharging third person who causes a discharge.[8]

However inconsistent we may think this disparate treatment, however much we may be of the view that we could tidy up the statute and make of it what to us seems to be more sense, it is simply not part of our function as judges to re-write, in the guise of statutory construction,

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[8] However, if we were members of Congress concerned with economic reality as well as logic, and if we had had the benefit of the extensive hearings as to the problems of insuring against oil-pollution damage, we may have concluded that third parties needed no such exclusive-liability feature to obtain adequate insurance protection, as compared with those in the category of dischargers, who are exposed daily (rather than exceptionally) to the risk of causing oil-pollution damage, *see* note 5 *supra*.

Dixie Carriers quotes a leading Congressional exponent of the conference compromise ultimately enacted as stating, 627 F.2d at 739-40:

> Limitations of liability and imposition of liability should not be such as to preclude the possibility of recovery of cleanup costs from the *discharger*. We felt that the gauge of this liability should be whether or not insurance could be obtained to cover these events. Consequently, the House bill provided for limitations of liability for vessels based upon an evaluation of the world insurance market for this new type of risk. (Emphasis supplied.)

If this was the basis upon which Congress decided to treat differently the liability of dischargers and of non-discharging third parties, it would be difficult for judges to determine that this classification was irrational or unreasonable so as somehow to ignore or to re-write unambiguous language that provided the oil-pollution liability of negligent non-discharging third persons to be different from that Congressionally provided for negligent dischargers.

unambiguous statutory language in order to cure what to us seems to be statutory deficiencies. Last term, the Supreme Court so admonished on at least two occasions.

In *American Tobacco Company v. Patterson*, __ U.S. __, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982), reversing a circuit court's interpretation of unambiguous statutory language to different effect, the Court noted that while "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results where possible, "__ U.S. __, 102 S.Ct. at 1538.

> [a]s in all cases involving statutory construction, "our starting point must be the language employed by Congress," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962), Thus "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2055, 64 L.Ed.2d 766 (1980).[9]

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[9] Considering that the present unambiguous subsection (h) was involved in a text hammered out in conference committee as a compromise of conflicting interests and approaches, we also find particularly appropriate the Court's further remarks, __ U.S. __ at __, 102 S.Ct. at 1537:

> The plain language of § 703(h) is particularly cogent in light of the circumstances of its drafting. It was part of the Dirksen-Mansfield compromise bill which represented "not merely weeks, but months of labor." 110 Cong.Rec. 11935 (1964) (remarks of Sen. Dirksen). As Senator Dirksen explained, "I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase."

__ U.S. at __, 102 S.Ct. at 1537.

Again, in *Griffin v. Oceanic Contractors, Inc.*, __ U.S. __, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), the Supreme Court reversed this circuit and its line of decisions that had "sensibly" construed a statute provision contrary to its unambiguous expression, and the Court explicitly enjoined against creative judicial interpretation of an unambiguous statute in order to accord with its supposed purpose (despite absence of any legislative history indicating any intention other than that expressed by the unambiguous wording):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. (1940). See *Caminetti v. United States*, 242 U.S. 470, 490, 37 S.Ct. 192, 196, 61 L.Ed. 442 (1917). Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning...would thwart the obvious purpose of the statute.' " *Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965) (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-11, 61 S.Ct. 368, 371, 85 L.Ed. 303 (1941)). This, however, is not the exceptional case.

__ U.S. at __, 102 S.Ct. at 3250.

It is true that interpretations of a statute which

would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. See *Unitd States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542-543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940); *Haggar v. Helvering*, 308 U.S. 389, 394, 60 S.Ct. 337, 339, 84 L.Ed. 340 (1940). In refusing to nullify statutes, however hard or unexpected the particular effect, this Court has said:

> "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 50, 75 L.Ed. 156 (1930).

__ U.S. at __, 102 S.Ct. at 3252.

In summary, as to the issue now before us, the panel adheres to its view that we should apply unambiguous statutory provisions as written. The statutory compromise of differing interests and approaches may indeed contain inconsistencies and ambiguities in some of its *other* provisions (as typically compromise legislation does within the competence of Congress). Nevertheless, the panel finds these alleged inconsistencies to be no reason to refuse to apply the unambiguous provisions, solely before us, as written, in the complete absence of any legislative history contraindicating the intent unambiguously stated by the particular provision at issue (subsection (h)) as written.

The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges

who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

Before CHARLES CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge, with whom BROWN, RUBIN and JOLLY, Circuit Judges, join, dissenting from the denial of Suggestion for Rehearing En Banc:

With a certain deference, I dissent from the refusal of the court to accord en banc consideration to this appeal. Our refusal to do so leaves standing the panel opinion,[1] one which deranges the apparent plan of the Federal Water Pollution and Control Act (FWPCA) and, taken in combination with our earlier decision in *United States v. Dixie Carriers, Inc.*,[2] produces consequences sufficiently anomalous that I am in serious doubt the Congress could have intended them. As now construed by two panels of our court, operating separately, the FWPCA calls to mind nothing so much as the wag's depiction of a camel: a horse designed by a committee. On this construction, actual dischargers of oil pollutants who are guilty of no more than simple negligence are protected by tonnage limitations on their cleanup liabilities, while third parties whose simple negligence is the cause of such spills are—as maritime tortfeasors—subject to being crushed by full and unlimited liability for the consequences.

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[1] Reported at 681 F.2d 432 (5th Cir. 1982).

[2] 627 F.2d 736 (5th Cir. 1980).

I am in no sense certain that the panel opinion's construction, founded as it is on the rock of a literal reading of the statute, is incorrect. It well may be that the strange result produced, having been configured by literal words of the Congress, must be endured by our maritime commerce until the Congress gets around to correcting it. But since neither I nor the panel can make out the faintest rhyme or reason for such an enactment, and since there are plausible arguments against according the act such an irrational construction, I think that these latter should have been addressed by the en banc court, which exists to—and alone can—harmonize panel decisions of our court short of a resort to the over-taxed higher authority.

The FWPCA: A Comprehensive Compromise.

The 1970 amendments to the FWPCA represent Congress' response to the nation's increasing need for imported oil and to the consequent increased risk of environmental damage from oil spills. See *United States v. Bear Marine Services*, 509 F.Supp. 710, 713 (E.D.La. 1980).[3] As might have been expected, the final enactment was a compromise. In its original form the Senate bill would have allowed the government an unlimited cleanup recovery upon proof of mere negligence, while the House proposal would, by contrast, have limited that recovery even in the case of a willful discharge. See *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739 (5th Cir. 1980). "The final statute allowing only limited recovery under a strict liability theory and allowing an unlimited recovery only upon proof of willful conduct represents a compromise between the two proposed statutes." *Id.* at 739.[4]

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[3] Presently on appeal and awaiting final decision in this case.

[4] We also observed there, in responding to a government conten-

Discharger Liability according to Dixie Carriers.

The crucial subsections of the statute for our present purposes are 33 U.S.C. Sections 1321(f), (g) and (h). The first two, (f) and (g), are conceptionally and linguistically parallel, as we shall see.

Subsection (f), as pertinent here, provides that a discharger of pollutants is to be held strictly liable for a limited amount of cleanup costs unless he can prove himself into one or more of the four statutory exceptions, and is liable without limit if the government establishes that his discharge was a willful one. The four exceptions comprise discharges caused solely by acts of God or of war, negligence by the government, and the act (whether or not negligent) of a third party.[5]

(Footnote 4 continued)
tion that it should be permitted to recover unlimited amounts on subsisting maritime tort theories, that "[e]very court that has considered this issue has held that the FWPCA provides the government's exclusive remedy for recovering oil spill cleanup costs," citing numerous authorities, including the district court decision reversed by the panel in the instant case. *Id.* at 738. Thus the reasoning of the panel is in patent conflict with the general view of the statute taken by the *Dixie Carriers* court.

[5] The apposite language of subsection (f) is:

> Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an

Citing the apparent intent of Congress to enact "a compromise bill that limits the government's recovery for cleanup costs in all cases except those involving willful discharges" and so to "deter oil spills and recover cleanup costs in a manner that would protect most vessel owners from potential crushing liability."[6] our earlier panel rejected the contention of the United States that where it could establish simple negligence on the part of a *discharger* the maritime tort action was not preempted by the statutes and a full recovery might be had. Instead, it accepted the discharger's argument that "the language, legislative history, and general statutory scheme of the FWPCA demonstrate Congress' intent to provide an exclusive and comprehensive remedy for the government to clean up oil spills and to recover cleanup expenses." *Dixie Carriers, supra* at 738. Judge-made theories of maritime tort were, in the view of the *Dixie Carriers* court, swept away by the FWPCA insofar as they intruded upon the Congress' comprehensive scheme of limited absolute liability for negligent carrier-dischargers. With the instant panel decision, however, we learn that the congressional scheme was not comprehensive after all, since those same carriers (or others), should they find themselves the sole cause of *another's* oil spill, remain subject to unlimited

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(Footnote 5 continued)

inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs.

[6] *Dixie Carriers*, 627 F.2d at 739.

liability in maritime tort. And thus our committee construction of the FWPCA: limited liability if one negligently dumps his own oil; unlimited liability if one negligently causes another to dump him. A crazy-quilt indeed, one by which Mr. Bumble would have been pleased.

Third-Party Liability, according to Big Sam.

Subsection (g) governs the liability of third parties who solely cause oil spills. Taking up on subsection (f)'s third-party exeption to discharger liability, that section provides the identical liability for such a third-party sole-causer to that of a discharger. Unless such a third-party causer can prove himself into the same exceptions to liability granted in subsection (f) to the discharger, his liability is substituted for that of the discharger.[7]

[7] The apposite language of Subsection (g) is:

> In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an

The instant panel has concluded that this is not so, that those whose simple negligence causes discharges by others are to be exposed to "potentially crushing liability," *supra*, are meant by the Congress to incur it, rather than or in addition to the limited liability scheduled. Thus he who, carrying oil, solely and carelessly causes another to discharge it, is to be—in appropriate circumstances—crushed, while he who carried it and carelessly discharged it is to be shielded. Nor is this anomalous treatment limited to third parties who have engaged in oil carriage and reaped the benefit of the rates charged for such commerce; any third party will do as a sacrifice. It seems to me arguable that the Congress did not and could not have intended such an exercise in statutory Russian Roulette.

The Maritime Tort Exception.

Subsection (h) preserves all rights that the government "may have against any *third party* whose actions may have in any caused or contributed to the discharge...." (Emphasis supplied.)

The panel has held that by reason of the above, and despite Section)g), the government may recover without limit against a third-party sole-causer. Thus, we decree, he may be crushed, while an equal-fault discharger is to be shielded. By default, the court en banc agrees. From that

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(Footnote 7 continued)

inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore of offshore facility from which the discharge actually occurred if such owner or operator were liable.

default, I respectfully dissent: that Congress has said so in terms is persuasively arguable, perhaps plain; that its intent was to say so is, in my view, dubuious—sufficiently so that I am satisfied our court has slighted its en banc function by refusing to face and resolve a fundamental conflict in principle between its panels, to adopt the approach of the *Big Sam* panel and limit or disapprove the reasoning of *Dixie Carriers*, or to consider the countervailing arguments for a construction of the Act consonant with our prior panel decision in *Dixie Carriers*. Among these are:

1. As noted above, our earlier *Dixie Carriers* opinion concluded that, since subsection (f)'s liability limitations apply in cases of simple negligence, the FWPCA preempts the general maritime tort remedy for such negligence. Though that decision concerned the liability of dischargers, the decision of the *Big Sam* panel that subsection (g)—textually and conceptually identical to and interlocking with subsection (f)—does not preempt the general maritime tort remedy for simple negligence of third-party causers of discharges conflicts in principle with *Dixie Carriers* and throws the general congressional scheme into irrational disarray.

2. By focusing exclusively on the literal language of subsection (h) preserving the government's rights against third-party causers, the panel opinion saps the limitation of liability provided them by subsection (g) of vitality and all but reads it out of the statute.

3. The *Big Sam* panel adopts as to third-party causers the approach of the original Senate bill—unlimited recovery for simple negligence—that was squarely rejected by the Congress. Such an adoption of a rejected approach in the teeth of the legislative history conflicts with the

strongest settled principles of statutory construction, both in this court and in the Supreme Court. *See, e.g., Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 196, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974).

These do not seem to me to be inconsiderable arguments, especially in view of the curious result to which a single-minded focus on the language of subsection (h) has led our panel in this case. Nevertheless, our court refuses even to consider them en banc.

So doing, it passes to an overburdened Supreme Court the task of relieving those within our jurisdiction from burdens of which it is probable the Congress meant to discharge them, preserves a clear conflict in principle in our decisions, and abdicates what I conceive to be its major function.

APPENDIX "D"

UNITED STATES OF AMERICA

V.

M/V BIG SAM, in rem, Tri-Capt, Inc., Zito Towing, Inc., ABC Insurance Co., T/B Butane, in rem, Keith S. Edwards, and Water Quality Insurance Syndicate

Civ. A. No. 78-86

United States District Court, E.D. Louisiana

May 9, 1978

Gerald J. Gallinghouse, U.S. Atty., Leonard P. Avery, Asst. U. S. Atty., New Orleans, La., James A. Lewis, Admiralty & Shipping Sec., Dept. of Justice, Washington, D. C., for plaintiff U.S.

Francis Emmett, New Orleans, La., for defendants Keith S. Edwards d/b/a Delta Barge Line, Water Quality Ins. Syndicate, and Keith S. Edwards d/b/a Delta Barge Line as claimant of the Barge BUTANE.

Normand F. Pizza, Reuter & Reuter, New Orleans, La., for defendants M/V BIG SAM and Zito Towing, Inc.

Poitevent & Hanemann, John Poitevent, Trial Atty., New Orleans, La., for Tri-Capt. Inc.

Phelps, Dunbar, Marks, Claverie & Sims, Leonard N.

Bouzon, Thomas J. Wagner, Trial Attys., New Orleans, La., for Mission Ins. Co.

HEEBE, Chief Judge.

This cause came on for hearing on a previous day on the (1) motion of defendants M/V Big Sam and Zito Towing, Inc. to enjoin seizure of vessel or in the alternative to set bond; (2) motion of defendants M/V Big Sam and Zito Towing, Inc., to dismiss causes of action one and two against the M/V Big Sam; (3) motion by defendant Zito Towing, Inc., to dismiss causes of action one, two and three against Zito Towing, Inc.; (4) motion of defendants Keith S. Edwards d/b/a Delta Barge Line, Water Quality Insurance Syndicate, and Keith S. Edwards d/b/a Delta Barge Line as claimant of the Barge Butane to dismiss or for summary judgment.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendants M/V Big Sam and Zito Towing, Inc., to enjoin seizure of vessel or in the alternative to set bond, be, and the same is hereby GRANTED to the extent that seizure of the vessel is enjoined but only if defendants M/V Big Sam or Zito Towing, Inc., post security of $400,000.00.

IT IS THE FURTHER ORDER OF THE COURT that the motion of defendants M/V Big Sam and Zito Towing, Inc., to dismiss causes of action one and two against the M/V Big Sam, be, and the same is hereby, DENIED.

IT IS THE FURTHER ORDER OF THE COURT that the motion of defendant Zito Towing, Inc., to dismiss causes of action one, two and three against Zito Towing, Inc., be, and the same is hereby, DENIED.

IT IS THE FURTHER ORDER OF THE COURT that the motion of defendants Keith S. Edwards d/b/a Delta Barge Line, Water Quality Insurance Syndicate, and Keith S. Edwards d/b/a Delta Barge Line as claimant of the Barge Butane to dismiss or for summary judgment, be, and the same is hereby, DENIED.

REASONS

This action was brought by the United States in admiralty to recover civil penalties and the expense of oil removal resulting from a discharge of oil by T/B Butane after a collision on April 25, 1975, between M/V Big Sam and T/B Butane in the Mississippi River.

Defendant M/V Big Sam is a tugboat of 155 gross tons, presently owned by defendant Zito Towing, Inc. Defendants TriCapt, Inc., and Zito Towing, Inc., were and presently are incorporated and doing business in Louisiana and were the owner, operator and charterer of M/V BIG SAM on April 25, 1975. Defendant T/B Butane is a barge of 1,324 gross tons, presently owned by defendant Keith S. Edwards d/b/a Delta Barge Line was and now is an individual domiciled in the State of Texas and doing business in Louisiana and was the owner and operator of T/B Butane on April 25, 1975.

The complaint of the United States alleges six causes of action. The first cause of action alleges that defendants M/V Big Sam, Tri-Capt., Inc., and Zito Towing,

Inc., and their officers, agents and employees were negligent in the operation of M/V Big Sam, that the negligence caused the discharge of oil into the river, and that the United States is entitled to damages for the expense of oil removal ($278,648.36). The second cause of action alleges that M/V Big Sam and T/B Butane are liable under the Rivers and Harbors Act of 1899, 33 U.S.C. §§407, 411-412, for, respectively, causing a discharge and discharging of refuse matter (oil) into the navigable water of the United States and that both are liable in damages for the expense of removal and the M/V Big Sam is additionally liable for a penalty from $500.00 to $2,500.00 to be fixed by the Court. The third cause of action alleges liability by all defendants for plaintiff's expense of oil removal under the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1251, *et seq.*, arising against defendants T/B Butane and Keith S. Edwards d/b/a Delta Barge Line for discharge of oil into navigable waters and against defendants M/V Big Sam, Tri-Capt, Inc., and Zito Towing, Inc., for causing oil to be discharged in navigable waters. The fourth and fifth causes of action are brought pursuant to the Louisiana Direct Action Statute, LSA-R.S. 22:655, against ABC Insurance Company and Water Quality Insurance Syndicate, the Protection and Indemnity Insurers respectively, of M/V Big Sam and its owners and operators and of T/B Butane and its owners and operators on April 25, 1975, against the risk of claims alleged in the complaint, for the expense of removal of oil from the river. The sixth cause of action seeks a $500.00 penalty against Tri-Capt, Inc., for failure of the operator of the M/V Big Sam to hold a license for the section of the river around mile 103 AHOP in violation of 46 U.S.C. §405.

1. The causes of action against the M/V Big Sam.

While the vessel M/V Big Sam has three causes of action alleged against it (negligence [maritime tort], Refuse Act violation [33 U.S.C. §407], and violation of Federal Water Pollution Control Act Amendments of 1972 [33 U.S.C. §1251, *et seq.*]), its motion is to dismiss only the negligence and Refuse Act claims. Since it does not appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," these causes of action cannot properly be dismissed. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

a. The negligence claim alleges that the M/V Big Sam negligently collided with T/B Butane and caused the discharge of an estimated 210,000 gallons of crude oil from T/B Butane into the Mississippi River. Defendants deny that any such cause of action or right of action exists.

In evaluating these contentions, we observe that a cause of action for negligence traditionally has four elements:

1-A duty or obligation recognized by the law requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks.

2-A failure on his part to conform to the standard required.

3-A reasonable close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause."

4-Actual loss or damage resulting to the interests of another.

See, Prosser, Law of Torts, §30 (4th Ed. 1971).

While it is not clear which element or elements the defendants contend to be legally nonexistent, the law seems to embody all of these elements.

There is the question of whether or not there is a duty under law by a vessel operating on the navigable waters of the Mississippi River to use due care with respect to the United States in avoiding oil spillage which the United States might become liable to clean-up. Both existing jurisprudence and wise public policy dictate this Court's conclusion that the United States is owed such a duty. As stated in *State Department of Fish and Game v. S.S. Bournemouth*, 307 F.Supp. 922, 929 (C.D. Cal. 1969):

> "Oil pollution of the nation's navigable waters by seagoing vessels both foreign and domestic is a serious and growing problem. The cost to the public, both directly in terms of damage to the water and indirectly of abatement is considerable. In cases where it can be proven that such damage to property does in fact occur, the governmental agencies charged with protecting the public interest have a right of recourse in rem against the offending vessel for damages to compensate for the loss."

While the United States does not own the waters of the Mississippi River into which the oil was spilled, the federal government does have constitutional and statutory responsibility to preserve, protect and maintain the country's navigable waters, including the Mississippi River. This includes the "inherent power to protect the public welfare by bringing common law suits" for damages for oil

pollution, recognized in *State of Maryland v. Almerada Hess Corp.*, 350 F.Supp. 1060, 1066-1067 (D.Md. 1972). "The federal courts have long considered oil pollution as a maritime tort for which damages may be awarded." *American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241, 1247 (D.Fla. 1971), *rev'd on other grnds.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280, *reh. den.*, 412 U.S. 933, 93 S.Ct. 2746, 37 L.Ed.2d 162. These cases are predicated on the existence of proximately caused actual damage to the United States.

Defendant contends that there would be an inconsistency between the existence of a maritime tort for oil spillage and the delineation of the rights of the United States in 33 U.S.C. §1321(g), setting third party owner or operator liability at $100.00 per gross ton of the vessel, or $14,000,000.00, whichever is lesser. However, this contention flies in the face of 33 U.S.C. §1321(o), which clearly preserves any existing obligations for damages in the following language:

> "(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.
>
> "(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not

in conflict with this section."

An examination of the legislative history of the Federal Water Pollution Control Act Amendments of 1972 found at 1972 U.S. Code Cong. & Admin. News, p. 3668, 3731-3733, indicates that "The portions of this section [Section 311-Oil and Hazardous Substance Liability] that deal with clean-up liability for oil discharges are taken from existing law. Modifications add liability for the clean-up of any hazardous material discharged on to the navigable waters." The Committee Report further states that "We have examined the issue of whether there should be financial limitations of liability for the costs of removal of hazardous polluting substances, and we have concluded that there should be no liability limitations imposed. * * * [H]azardous substances heretofore treated in a separate section should be subject to the same control mechanism applied to oil."

b. The United States also brought an action *in rem* against M/V Big Sam for alleged discharge of refuse matter into the navigable waters in violation of the Refuse Act of 1899, 33 U.S.C. §407. In pertinent part, the statute reads:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . from or out of any ship, barge, or other floating craft of any kind . . . any refuse matter of any kind or description whatever . . . into any navigable water of the United States . . . ."

The liability of vessels engaged in violations of this statute is set forth in the second sentence of 33 U.S.C. §412, which in pertinent part reads as follows:

> "And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408 and 409 of this title shall, be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft . . . and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."

Defendant's contention that *United States v. Beatty, Inc.*, 401 F.Supp. 1040 (W.D.Ky. 1975), requires dismissal because of the absence of an indictment or information against the M/V Big Sam is a misinterpretation of that case. The *Beatty* decision related to prosecutions under 33 U.S.C. §411 and properly held that such criminal prosecutions cannot proceed in the absence of an indictment or information. Here, the action is noncriminal and is brought under 33 U.S.C. §412 for damages and civil penalties. This *in rem* proceeding does not require an information or indictment. *The Scow* "6-S," 250 U.S. §269, 272, 39 S.Ct. 452, 63 L.Ed. 977 (1919); *The Barbara Cates*, 17 F.Supp. 241, 243-244 (E.D.Pa. 1936); *United States v. M/V Martin*, 198 F.Supp. 171, 176 (S.D. Ill. 1961), aff'd 313 F.2d 851 (7th Cir. 1963).

Accordingly, causes of action one and two against the M/V Big Sam should not be dismissed.

2. The causes of action against Zito Towing, Inc.

While Zito Towing, Inc. has moved for dismissal of causes of action one, two and three against it, the complaint only names Zito Towing, Inc., as a defendant in

causes one (which alleges maritime tort) and three (which alleges violation of the Federal Water Pollution Control Act Amendments of 1972).

a. Zito Towing, Inc., is the alleged owner of the tugboat M/V Big Sam. The existence of vessel owner liability for the tort of oil pollution has been recognized in the jurisprudence. *State of Maryland, Dept. of N. Res. v. Amerada Hess Corp.*, 350 F.Supp. 1060 (D.Md. 1972); *Burgess v. M/V Tamano*, 370 F.Supp. 247 (D.Me. 1973), aff'd 559 F.2d 1200. The availability of such a remedy furthers the public interest by serving as an added inducement for such owners to exercise due care. See, *Potomac Riv. Ass'n. Inc. v. Lundeberg Md. Sea. Sch., Inc.*, 402 F.Supp. 344, 356-357 (D.Md. 1975). The clear public interest in avoiding pollution from oil spills has already been noted in *State Department of Fish and Game v. S.S. Bournemouth*, 307 F.Supp. 922, 929 (C.D. Cal. 1969).

b. Zito Towing, Inc., has also alleged itself free of liability under the Federal Water Pollution Control Act Amendments of 1972 by virtue of the fact that there was a finding in *Naptha Barge Company v. Continental Navigataon Company*, CA No. 75-1281, Section H, Eastern District of Louisiana, that the owner, pro hac vice, operator and claimant of the M/V Big Sam was Tri-Capt, Inc. and that there was no finding in that case that there was willful negligence or willful misconduct within the privity or knowledge of Zito Towing, Inc. However, the *Naptha Barge* case was simply a collision damages suit between private parties and the United States did not participate in the proceedings of that case. That suit thus did not address the claims of the United States, if any, under the Federal Water Pollution Control Act Amendments or 1972, 33 U.S.C. §1251, *et seq.*, and particularly under section 1321(g).

To that extent that defendant seeks by this motion to obtain collateral estoppel or res judicata against the United States, we note that those are affirmative defenses which normally are raised by way of answer to the complaint. F.R. Civ. P. Rule 8(c). However, in the interest of efficient and expeditious judicial administration of justice, a defense such as res judicata or collateral estoppel may be raised either by motion or in the answer. 5 Wright & Miller, *Federal Practice and Procedure*, §1277 (1969); *Hartmann v. Time, Inc.*, 166 F.2d 127, 131 n.3 (3rd Cir. 1947); *Thistlethwaite v. City of New York*, 362 F.Supp. 88, aff'd 497 F.2d 339, *cert. den.* 419 U.S. 1093, 95 S.Ct. 686, 42 L.Ed.2d 686 (1974). In allowing such defenses to be adjudicated on motion rather than by way of answer, the court should give all parties the opportunity to present pertinent evidentiary material to the court. 5 Wright & Miller, *supra* at p. 331. In the instant case, the government attorney expressly stated during oral argument that he wishes to present evidence with respect to the res judicata or collateral estoppel issues but cannot do so until discovery has progressed further. At the present time, this case is quite young, having been filed on January 10, 1978. Until discovery has reached a stage where all parties have had a fair opportunity to develop the evidence pertinent to the issues of collateral estoppel or res judicata, this Court cannot properly address those issues. *Collins v. PBW Stock Exchange, Inc.*, 408 F.Supp. 1344 (D.Pa. 1976).

Accordingly, the causes of action against Zito Towing, Inc., cannot be properly dismissed.

3. Motion to enjoin seizure of M/V Big Sam or in the alternative to set bond at $31,000.00

a. Existence of maritime liens.

Defendants M/V Big Sam and Zito Towing, Inc., move to enjoin seizure of the M/V Big Sam on grounds that there is no maritime lien against the vessel for the causes of action alleged. Defendants are mistaken.

With respect to the alleged maritime tort of oil pollution, the existence of a martime lien has been expressly recognized in *State of California v. S.S. Bournemouth*, 307 F.Supp. 922, 926 (C.D. Cal. 1966), as follows:

> "Defendant takes the position that only two types of maritime torts create maritime liens: collision claims and personal injury claims. . . .The court finds no merit in defendant's position and is of the opinion that the tort in question is martime in nature; that a maritime lien against the Bournemouth arises in favor of the plaintiff which will support an admiralty action *in rem*, as a matter of general maritime law without the aid or necessity of a statutory lien. . . ."

With respect to the alleged violation of the Refuse Act, there is a summary proceeding *in rem* against the vessel pursuant to 33 U.S.C. §412. As observed in *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 215, 18 L.Ed. 753 (1867), "in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process."

With respect to the alleged violation of the Federal Water Pollution Control Act Amendments of 1972, there arises a statutory lien pursuant to 33 U.S.C. §1321(g) as to the vessel causing the discharge from another vessel. This lien is maritime in nature, in light of the fact that it arises out of conduct which is peculiarly maritime (viz., spillage of oil on the navigable waters in the course of shipping the oil

in vessels on the navigable waters). *See Gilmore & Black, The Law of Admiralty*, §9-20 (2d Ed. 1975), which says at p. 629 n.95b:

> "The Federal Water Quality Improvement Act of 1970...gives maritime lien status to actions by the United States to recover its costs for cleaning up pollution of navigable waters resulting from the discharge of oil and other substances. The statute does not characterize the lien which should no doubt be categorized as a tort lien."

b. Amounts of liens.

While the Court concludes that there are alleged maritime liens against the M/V Big Sam arising out of each of plaintiff's causes of actions against that vessel, the amounts of the liens are not the same in all instances. Under the Federal Water Pollution Control Act Amendments, 33 U.S.C. §1321 (g), the lien would be limited to $31,000.00. However, under the lien would equal the amount of costs shown by the government to be reasonable plus perhaps interest and costs (subject to the maximum set by the value of the vessel and its cargo under 46 U.S.C. §183). *Burgess v. Tamano*, 564, F.2d 964, 983 (1st Cir. 1977). In light of the government's claim that actual removal costs were $278,648.36, the amount of the lien for either of these causes of action could reasonably equal that amount. The amount of security which the plaintiff would seek in lieu of exercising seizure is $400,000.00, which is reasonable under Rule E(5)(a)(i) of the supplemental Rules for Certain Admiralty and Maritime Claims, which authorize the maximum value of a special bond to be set at twice the amount of plaintiff's claims.

Defendants request that seizure not be allowed on the

grounds of the contention that there is no maritime lien and the contention that seizure would work an irreparable hardship on defendant. As already shown, the former contention has no merit. As to the latter contention, if defendant posts a bond in the amount of $400,000.00, then seizure will not be necessary. Because lien are alleged under maritime tort law and the Refuse Act, the security posted cannot merely be limited to the $31,000.00 which would suffice if the only alleged lien were under the Federal Water Pollution Control Act Amendments.

4. Motion to dismiss or for summary judgment in favor of defendants Keith S. Edwards d/b/a Delta Barge Line and Water Quality Insurance Syndicate.

Keith S. Edwards d/b/a Delta Barge Line is the owner of the T/B Butane, a tank barge. Water Quality Insurance Syndicate is the oil pollution insurer of the T/B Butane with respect to liabilities of vessels and owners as provided by the Federal Water Pollution Control Act Amendments of 1972.

The T/B Butane was the face barge in a string of three barges being pushed by the M/V Letha C. Edwards (a tug) in the Mississippi River at the time of the collision which caused the oil spill in question. The T/B Butane was a dumb barge without motive power or crew and entirely in control of the M/V Letha C. Edwards, which was operated by Naptha Barge Company, a Texas Corporation. The collision between M/V Big Sam (under the operation of Tri-Capt, Inc.) and the flotilla including T/B Butane occurred in daylight on April 25, 1975.

Defendants Edwards and T/B Butane contend that they are entitled to have the complaint dismissed and/or summary judgment on all claims asserted under the Federal

Water Pollution Control Act of 1972(1) because it has been judicially established that the spill from the Butane was caused by ". . . an act or omission of a third party," and (2) because the Butane was a dumb barge under the control of a tug when the collision and spill occurred and she, the Butane, could not possibly be at fault, as no conceivable facts could render her so.

The motion to dismiss certainly cannot be granted because the complaint does indeed set forth allegations which, if proved, would comprise a valid claim under the Federal Water Pollution Control Act. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). It is not inconceivable that a dumb barge may have contained some defect of design, loading, or otherwise which could have resulted in needless spillage as a result of a collision.

With respect to the claim for summary judgment, the United States has expressly requested an opportunity to engage in discovery to ascertain whether or not there is any merit to defendant's assertion that it has a defense under 33 U.S.C. §1321(f). As already noted above, the Court is of the opinion that at the present time the government has not had ample opportunity to develop any pertinent evidence it may wish to present on the issues of collateral estoppel or res judicata with respect to the Naptha Barge proceeding in which it was not a party. Discovery in the instant proceeding should proceed forthwith, and defendants may wish to renew their summary judgment motion at a later point.

Defendants contend that their participation in the instant proceedings necessarily will result in undesirable multiplicity of litigation because of their allegedly inevitable ability to recover from the United States in the Court of Claims any amount the United States may recover from

them in the instant action. This argument is not cognent at the present time because of the dispute as to whether defendants qualify under 33 U.S.C. §1321(i)(1) as an owner or operator who "acts to remove" a spill, an issue which cannot on the present state of the record be definitively decided in defendants' favor. Further, defendants' reliance on the Naptha Barge decision as to which there has not been ample opportunity for the government to do discovery precludes disposition of this question at the present time.

The additional contentions of the defendants are that there can be liability under the Rivers and Harbors Act of 1899 because (1) that Act was superseded by the Federal Water Pollution Control Act of 1972, (2) the 1899 Act only applies to refuse which hinders navigation or anchorage, and (3) the 1899 Act requires proof of fault, which is allegedly impossible in the instant case.

(1) With respect to defendants' first contention, this Court concludes that the Rivers and Harbors Act of 1899 (also called Federal Refuse Act of 1899) still retains vitality. Specific support for the proposition that the Federal Water Pollution Control Act Amendments of 1972 do not supersede the 1899 Act is provided by *United States ex rel. Scott v. United States Steel Corp.*, 356 F.Supp. 556, 559 (N.D.Ill. 1973), where the court says:

> "Defendant argues that the Federal Refuse Act has been superseded by the 1972 amendments to the Federal Water Pollution Control Act . . . . Suffice it to say that the 1972 amendments did not purport to repeal the Federal Refuse Act which, on the contrary, was specifically preserved by the 1970 amendments to the Federal Water Pollution Control Act (33 U.S.C. §1174 (2) and by Section 511(a)(2)(B) of the 1972 amendments (P.L. 92-500)."

The fact that the 1972 Act expressly makes reference to the 1899 Act in its savings clause (33 U.S.C. §1371) substantially eviscerates defendants' contention that the newer legislation should be viewed as an amendment of the older. Indeed, the very case cited by defendant in support of the proposition that newer legislation should be viewed as amending older legislation says that the general rule applies when "there is no statutory language which makes any cross-reference," which is just the contrary of the situation before this Court. *Hines, Inc. v. United States*, 551 F.2d 717, 725 (6th Cir. 1977). *Also see United States v. United States Steel Corporation*, 328 F.Supp. 354, 358 (N.D. Ind. 1970), where a district court rejected the argument that it should "accommodate" or "reconcile" the 1899 Act with the 1970 Federal Water Pollution Control Act in a manner which would in effect repeal the 1899 Act.

The specific language of the 1972 Act provides that "This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter . . . ." 33 U.S.C. §1371(a)(1). While not considering this specific language, the United States District Court for the Eastern District of Virginia reached the conclusion that the 1972 Act is the sole available basis upon which the federal government may seek recovery of clean-up costs, a decision which is presently on appeal to the Fourth Circuit. Complaint of Steuart Transportation Co., 435 F.Supp. 798, 807808 (E.D.Va. 1977), says:

> As to the United States' claim for clean-up costs, the Court holds that FWPCA acts as a limit to that claim regardless of the basis on which it is made. By enacting FWPCA, Congress comprehensively established standards and limits of liability

> for oil spill clean-up costs. The Government will not be permitted to present a claim for such costs under general maritime law, common law, or other statutes. *See* 3 Benedict on Admiralty, §112; contra Gilmore & Black, *The Law of Admiralty* 828-29."

There does not appear to be any basis either in statutory language of the 1972 Act or in its legislative history for the Court's conclusion that the 1972 Act provides the sole basis upon which the United States may recover actual clean-up costs it expends. Rather, liability for actual costs of removal under 33 U.S.C. §1321(f) is limited to discharges in violation of 33 U.S.C. §1321(b)(3) which prohibits only discharges in "harmful quantities as determined by the President under paragraph (4)" of subsection b. Likewise, third party liability under 33 U.S.C. §1321(g) is limited to violations of subsection (b)(3). Not only are these violations limited to infractions of presidential regulations but furthermore section (h)(2) expressly provides that "The liabilities established by this section shall in no way affect any rights which . . . (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." 33 U.S.C. §1321(h)(2). The language of section (h)(2) expressly contradicts the conclusion of the court in *Steuart Transportation* that "The Government will not be permitted to present a claim for such costs under general maritime law, common law, or other statute."

The purpose or the 1972 Act is clearly to provide a basis on which the United States can obtain a recovery, not eliminate already existing remedies to the government, including those under prior statutes. For example, the legislative history of the 1972 Act shows that Congress was

specifically aware of and wished to keep in place as an effective enforcement medium the Refuse Act of 1899. Senator Griffin remarked to Senator Muskie, floor manager of the 1972 Act:

> "During the last 2 years there have been some 300 criminal convictions under section 13 of the Refuse Act and over 120 civil actions most of which resulted in the defendants either stopping the dumping or agreeing to institute pollution control programs. On the other hand, it is my understanding there have been only a handful of prosecutions for violation of water quality standards since the Federal Water Pollution Control Act was enacted. "In view of this—a fact recognized by the conferees—it is inconceivable that the Senate would want to emasculate the best available enforcement device now available—the Refuse Act."

United States v. Rohm & Haas Company, 500 F.2d 167, 171 n.2 (5th Cir. 1974) (118 Cong. Rec.S. 16882, October 4, 1972).

Further, when Congress wanted to specifically relegate particular discharges to the 1972 Act in derogation of previous statutes, it did so explicitly. For example, 33 U.S.C. §1371 (b) expressly states that discharges of pollutants into the navigable waters subject to certain acts of 1910 and 1888 will be subject to the 1972 Act rather than the older acts except as to effect on navigation and anchorage.

Furthermore, while there are express limitations in the statutory language of 33 U.S.C. §§1321(f) and (g) on the extent of liability imposed under causes of action created by those subsections, there is no inconsistency in finding that

those limitations embodied in 33 U.S.C. §§1321(f) and (g) do not pertain to the entirely separate causes of action created by the 1899 Act or by common law. It is not at all infrequent under the law that the same or similar conduct may subject one to civil suit under various causes of action, each of which may in turn be subject to different defenses and different specific elements of quantum of damages. For example, conduct violative of the Fair Housing Act of 1968 (42 U.S.C. §§3601-3631) may also violate one of the general provisions protecting civil rights (e.g., 42 U.S.C. §1981 or 42 U.S.C. §1982). Or conduct violative of the Securities Act of 1933 may also state a cause of action under the Securities Exchange Act of 1934. The availability of such alternative remedies in the 1899 Act or common law and the 1972 Act is not an inconsistency in the law and does not fall within the purview of "inconsistency" envisioned by Congress in 33 U.S.C. §1371(a)(1).

Had Congress so intended, it could easily have provided that suit under 33 U.S.C. §§1321(f) and (g) is the exclusive grounds of civil liability in favor of the United States for the conduct here at issue. Congress certainly knows how to use the word "exclusive" when that word captures its intent. See, e.g., Longshoremen's and Harbor Workers' Compensation Act, §5, 33 U.S.C. §905. Congress did not express the concept of exclusivity in the 1972 Federal Water Pollution Control Act.

Accordingly, this Court concludes that the 1899 Act is still a significant source of remedy for governmental expenditures for oil spill removal.

(2) Defendants' contention that oil cannot qualify as refuse under the 1899 Act has been expressly repudiated by the United States Supreme Court. As stated in *United*

States v. Standard Oil Co., 384 U.S. 224, 229-230, 86 S.Ct. 1427, 1430, 16 L.Ed.2d 492 (1966), "There is nothing more serving of the label 'refuse' than oil spilled into a river." Defendants' reliance on the one paragraph per curiam opinion of the Fifth Circuit in *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140 (N.D.Ala. 1971), aff'd 456 F.2d 1294 (5th Cir. 1972), *cert. den.*, 410 U.S. 946, 93 S.Ct. 1352, 35 L.Ed.2d 613 (1973), *reh. den.*, 411 U.S. 910, 93 S.Ct. 1524, 36 L.Ed.2d 201 (1973), is misplaced. As stated by the United States Supreme Court in *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 671-672, 93 S.Ct. 1804, 1815, 36 L.Ed.2d 567 (1973):

> "The lower courts have almost universally agreed, as did the courts below, that §13 is to be read in accordance with its plain language as imposing a flat ban on the unauthorized deposit of foreign substances into navigable waters, regardless of the effect on navigation. [Numerous citations omitted]: contra, *Guthrie v. Alabama By-Products Co.*. . . ."

Furthermore, the United States pleads and contends that it is prepared to prove that T/B Butane's discharge of 210,000 gallons of crude oil constituted an interference with navigation, so that if the question of interference with navigation is in issue, there is genuine factual dispute with respect to it, precluding summary judgment.

(3) The defendants dispute the government's contention that the alleged violation of the Rivers and Harbors Act of 1899 imposes liability without fault. Unfortunately, for defendants, the Fifth Circuit has expressly held with regard to sections 408 and 412 (33 U.S.C. §§408, 412) that "Together these statutes have been construed to impose strict liability." *United States v. Tug Colette Malloy*, 507

F.2d 1019, 1022 (5th Cir. 1975). However, the Fifth Circuit's opinion does go on to say that if a defendant can show that another party is solely at fault in causing an accident, then a defense is established. Id. Defendants' citation of *United States v. Raven*, 500 F.2d 728 (5th Cir. 1974), is inapposite. The language of Chief Judge Brown that "the duty to say is confined to those who negligently cause the obstructiron (*Id.* at 733) had reference to the duty to mark and remove sunken vessels imposed under 33 U.S.C. §409 and was made in the context of a criminal prosecution, whereas the instant proceedings relate to 33 U.S.C. §§407 and 412 and are civil rather than criminal. As plainly noted in *United States v. The Terry E. Buchanan, Etc.*, 138 F.Supp. 754, 755-756 (S.D.N.Y. 1956):

> [S]tatutes prohibiting the dumping of refuse into harbors have been held to impose liability regardless of negligence or intent on the part of the ship's owner or master. In *The Colombo*, 2 Cir., 1930, 42 F.2d 211, a ship had leaked oil into the harbor because of the negligence of one of the seamen. The Court held that the fact that the master or owner had not authorized the unlawful act did not prevent liability. *See also The J. Rich Steers*, 2 Cir., 1915, 228 F. 319; *The Scow No. 36*, 1 Cir., 1906, 144 F. 932. In *The President Coolidge*, 9 Cir., 1939, 101 F.2d 638, this rule of strict liability was followed where a Chinese cook dumped refuse over the side of a ship in direct contravention to his employer's orders. The courts have upheld these strict liability statutes [vis., 33 U.S.C. §§407 or 408, together with 412] because of the government's power to enact laws for the protection of the general welfare.

APPENDIX "E"

UNITED STATES of America

v.

M/V BIG SAM, *in rem*, Tri-Capt, Inc., Zito Towing, Inc., ABC Insurance Co., T/B BUTANE, *in rem*, Keith S. Edwards, and Water Quality Insurance Syndicate.

Civ. A. No. 78-86.

United States District Court
E. D. Louisiana.

Nov. 30, 1979.

John P. Volz, U.S. Atty., Leonard P. Avery, Asst. U.S. Atty., New Orleans, La., James A. Lewis, Admiralty & Shipping Section, Dept. of Justice, Washington, D.C., for plaintiff United States of America.

Francis Emmett, New Orleans, La., for defendants Keith S. Edwards d/b/a Delta Barge Line, Water Quality Ins. Syndicate, and Keith S. Edwards d/b/a Delta Barge Line as claimant of the Barge BUTANE.

Normand F. Pizza, Reuter & Reuter, New Orleans, La., for defendants M/V BIG SAM and Zito Towing, Inc.

Thomas J. Wagner, Phelps, Dunbar, Marks, Claverie & Sims, New Orleans, La., for defendant Mission Ins. Co.

HEEBE, Chief Judge:

On its own motion, this Court heard oral argument and received additional memoranda relative to reconsideration of its ruling of May 9, 1978, as it relates to a determination of two issues: whether or not the United States has a cause of action for recovery of its actual expenses incurred in oil clean-up operations based on a maritime tort of oil pollution; what the interaction is between the Refuse Act of the Rivers and Harbors Act of 1899, 33 U.S.C. §§407, 411-12, and the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1251, *et seq.* Contrary to our decision, published at 454 F.Supp. 1144 (1978), other courts have held that no tort action exists and that the FWPCA pre-empts the Refuse Act.

In *United States v. Dixie Carriers, Inc.*, 462 F.Supp. 1126 (E.D.La., 1978), the court said: "On the narrow issue of the liability of vessel owners and operators for the full amount of the United States oil spill cleanup expenses, I find that the statutes (Refuse Act of Rivers and Harbors Act and FWPCA) do conflict and the Refuse Act must give way." The court in *Complaint of Steuart Transportation Company*, 435 F.Supp. 798 (E.D.Va., 1977), stated: "The court holds that FWPCA acts as a limit to [the claim of the United States for oil spill clean-up expenses] regardless of the basis on which it is made. By enacting FWPCA, Congress comprehensively established standards and limits of liability for oil spill clean-up costs." (This latter case was affirmed, *Steuart Transp. Co. v. Allied Towing Corp., Etc.*, 596 F.2d 609 (4th Cir. 1979).) See, also *In re Oswego Barge Corp.*, No. 76-CV-269 (N.D.N.Y., Nov. 13, 1978).

On further examination, we have reconsidered these cases and are convinced by their reasoning. Consequently, the Court has decided to reverse its former decision in order to follow them and put ourselves in accord with the majority

view. This decision has several effects. First, the motion of Zito Towing, Inc. and the M/V BIG SAM for summary judgment against Mission Insurance Company, presently under submission in this case, is now moot. Second, the Court will accede to the alternative request submitted on behalf of Zito Towing and the M/V BIG SAM and reduce the bond required in the previous decision to a maximum of $15,500 ($100 x 155 gross tons), based on the tonnage of the BIG SAM. However, under this decision, we only decide that the United States has one cause of action against the parties, and that it is pursuant to the FWPCA. The Court is not determining, at this time, whether or not the claim is actually viable against all of the parties, but is amenable to receiving independent motions from any party desiring to raise the issue individually, in light of this new position the Court now takes. In particular, we are inclined to believe that defendants, Keith S. Edwards, d/b/a Delta Barge Lines, as claimant of the Barge BUTANE, should have a definitive indication from the United States as to what evidence they rely on to indicate any potential liability of these defendants under the FWPCA at this time.

Subsequent to the reargument of the matters presented above and submission of them to the Court, the United States moved the Court for a continuance of the trial in this matter, which is set for December 10, 1979. The basis for the motion is that this Court should wait the outcome of the decision on the appeal of *United States v. Dixie Carriers, Inc.*, supra, which the Fifth Circuit Court of Appeals has agreed to consider. As noted, the question in that case also is whether the FWPCA bars relief based on the Refuse Act and maritime tort. Without any means of determining when a decision will be rendered by the Fifth Circuit and whether or not the decision will then be appealed, we think it would be burdensome to defendants to have our case stayed for an

undefined period of time. However, because the Court itself is unable to try this case on that day because it will be trying a criminal case which must be heard at that time, the trial date will have to be continued, but to a fixed time. It may be that the action will be disposed of without the necessity of a trial, but a new trial date will be assigned in order to cover all eventualities. Accordingly,

IT IS THE ORDER OF THE COURT that the decision of the Court dated May 9, 1978, be, and the same is hereby, REVERSED and those causes of action set forth by the United States in its complaint based on tort liability or the Rivers and Harbors Act are hereby DISMISSED as to all named defendants.

IT IS THE FURTHER ORDER OF THE COURT that the previously set bond be, and the same is hereby, REDUCED to a maximum of $15,500, based on the tonnage of the M/V BIG SAM.

IT IS THE FURTHER ORDER OF THE COURT that the trial of this case, presently set for December 10, 1979, be and the same is hereby, CONTINUED to June 16, 1980, with a pre-trial conference SET for June 6, 1980.

APPENDIX "F"

UNITED STATES of America

v.

M/V BIG SAM, *in rem*, Tri-Capt, Inc., Zito Towing, Inc., ABC Insurance Co., T/B BUTANE, *in rem*, Keith S. Edwards, and Water Quality Insurance Syndicate.

Civ. A. No. 78-86.

United States District Court,
E. D. Louisiana.

Jan. 22, 1981

John P. Volz, U.S. Atty., Leonard P. Avery, Asst. U.S. Atty., New Orleans, La., James A. Lewis, Admiralty & Shipping Section, Dept. of Justice, Washington, D.C., for plaintiff United States of America.

Normand R. Pizza, Reuter & Reuter, New Orleans, La., for defendants M/V BIG SAM and Zito Towing, Inc.

Thomas J. Wagner, Phelps, Dunbar, Marks, Claverie & Sims, New Orleans, La., for defendant Mission Insurance Co.

HEEBE, Chief Judge:

On April 25, 1975, the M/V BIG SAM collided with an oil-carrying barge, the T/B BUTANE, in the Mississippi River and caused a substantial oil spill. The United States

cleaned up the oil spill. Suit was filed on the collision, which included all parties to the collision as litigants. Judgment was rendered in the suit on April 29, 1977. The Findings of Fact and Conclusions of Law reached in that suit, *Naptha Barge Co. v. Continental Navigation Co.*, No. 75-1281 (E.D.La.), have been stipulated to by the parties and agreed to as binding on them for the purposes of this suit.

The United States declined the request of the parties to the *Naptha Barge case* to join in that suit and, instead, on January 10, 1978, filed the instant suit to recover its expenses in cleaning up the oil spill that resulted from the collision of the M/V BIG SAM with the barge T/B BUTANE. Although the suit was originally brought on several different bases, this Court, on November 30, 1979, held that the United States had only one basis on which to recover for its cleanup activities and that was under the Federal Water Pollution Control Act, 33 U.S.C. §1321 (1973). *United States v. M/V BIG SAM*, 480 F.Supp. 290 (E.D.La. 1979). This view was subsequently affirmed on the appeal of another case in *United States v. Dixie Carrier, Inc.*, 627 F.2d 736, 742 (5th Cir. 1980), where the court categorically held that:

> In the absence of a clearer indication from Congress that the government may obtain recovery under additional theories, we conclude that the balanced and comprehensive scheme in 1321(f)(1) provides the exclusive remedy for the government to recover its cleanup costs from oil spills.

In the *Dixie Carrier* case, the oil spill occurred when a tugboat lost control of the tanker barges in its tow and one of them struck a bridge, discharging over a million gallons of oil into the Mississippi River. Consequently,

§1321(f)(1) of the FWPCA, which provides for recovery by the government of cleanup costs from the "owner or operator of any vessel from which oil... is discharged," was the applicable section of the Act for that case.

However, it is agreed in this case that the owner of the vessel, Zito Towing, Inc., had bareboat chartered the M/V BIG SAM to Tri-Capt, Inc., which was the sole operator of the vessel at the time it collided with the oil barge T/B BUTANE, which was then in the tow of the tugboat M/V LETHA C. EDWARDS, Zito Towing did not operate the BIG SAM at any time relevant to this occurrence. The court, in the *Naptha Barge* case, found that the M/V BIG SAM, while under bareboat charter to Tri-Capt, Inc., was the sole proximate cause of the collision and consequent discharge of oil from the BUTANE into the river. Therefore, 33 U.S.C. §1321(g) of the FWPCA, which applies to third-party liability, rather than subsection (f) of the Act, is applicable here. Section 1321(g) comes into play under an exception to §1321(f)(1) which provides a defense to the owner or operator of a discharging vessel where such "owner or operator can prove that a discharge was caused solely by... an act or omission of a third party...." Section 1321(g) provides, in pertinent part, that:

> where the owner or operator of a vessel ... proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party...such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government.... The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Although the actual costs of the cleanup to the United States exceeds the amount, liability under the FWPCA is limited to $15,500, i.e., $100 times the 155 gross ton weight of the M/V BIG SAM. 33 U.S.C. §1321(g) (1973). The government is not claiming that the discharge of oil was the result of willful negligence or willful misconduct within the privity or knowledge of a third party and is therefore limited to the maximum statutory amount under section 1321(g).

Having held that the FWPCA is the sole basis for the government to recover its cleanup costs, we are left with two final questions in this case. The *first*, in two parts, is (1) whether the FWPCA, under section 1321(g), establishes liability against the M/V BIG SAM, *in rem*, and (2) whether it establishes liability against the owner of the M/V BIG SAM, Zito Towing, Inc., under the facts of this case. The *second* is whether the United States is entitled to recover prejudgment interest on its award under the FWPCA. Initially, there was also a question as to whether Mission Insurance Co., the insurer of the M/V BIG SAM for Zito Towing, could be held liable. However, it was subsequently agreed by the government that its insurance provided protection and indemnity coverage, but not insurance against FWPCA claims.

1. *Action In Rem*

The FWPCA under section 1321(f)(1) expressly provides for a lien against the discharging vessel. The section states that the costs recoverable by the government:

> shall constitute a maritime lien on such vessel which may be recovered in an action *in rem* in the district court of the United States for any district

> within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

Even though section 1321(g) is devoid of any similar language which would provide for a right to bring an action *in rem* when a third-party vessel causes the discharge of oil, the United States takes the position that admiralty courts can infer appropriate remedies when necessary and that this would include inferring a maritime lien when a vessel is a principal in an act or omission that causes a discharge. The case of *State of California v. S.S. Bournemouth*, 307 F.Supp. 922, at 926 & 929 (C.D.Cal. 1969), is relied on as authority for this position. We do not think that the *Bournemouth* case gives such support. In that case, in which the state had filed a complaint *in rem* against a vessel to recover damages incurred because the vessel was discharging oil into the state's navigable waters, the court held that the complaint stated a maritime cause of action in tort giving rise to a maritime lien and consequent suit *in rem* in admiralty, independent of any statute. We have held to the contrary with respect to an independent maritime tort claim. However, the court in *Bournemouth*, supra at 924, did note that if the complaint had been brought pursuant to sections 151 and 152 of the California Harbors and Navigation Code, the plaintiff would have not been entitled to proceed *in rem* since the statute does not provide for a lien on the offending vessel and "a maritime lien is a necessary condition to a suit *in rem* in admiralty." The court did not attempt to read an implied right to a maritime lien into the statute as the government requests us to do here.

The government also relies on the fact that in this

Court's decision on reconsideration of *United States v. M/V BIG SAM*, 454 F.Supp. 1144 (E.D.La. 1978), in which the Court restricted the United States to the FWPCA claim alone, the Court continued in existence the lien established in the earlier decision, however limited to the amount recoverable under the FWPCA claim. But, in this second opinion, the Court, supra, 480 F.Supp. at 291, carefully limited the reconsideration to two issues, namely, whether the United States had claims under maritime tort or under the Refuse Act in addition to that under the FWPCA. In reducing the amount of the bond required, the Court, supra, stated this was being done pursuant to a specific request on the part of Zito Towing and the M/V BIG SAM and that its only decision was limited to a holding "that the United States has one cause of action against the parties, and that it is pursuant to the FWPCA." Considering the fact that Congress did provide for a maritime lien, and accompanying action *in rem*, in subsection (f) but not in subsection (g), we can only conclude that it did not intend to provide for actions *in rem* under subsection (g). We therefore hold that the United States is not entitled to bring an action *in rem* against the M/V BIG SAM pursuant to section 1321(g).

2. *Liability of Zito Towing*

As previously stated, it is stipulated that Zito Towing owned the M/V BIG SAM and Tri-Capt operated as a bareboat charterer at the time of the collision which caused the discharge of oil from the T/B BUTANE. It is furhter stipulated that the sole cause of the collision and ensuing discharge was the negligent manner in which the M/V BIG SAM was operated. It is clear from the *Naptha Barge* decision that there was nothing inherently wrong with the vessel, itself, which caused the accident. As a matter of

fact, the operator hired by Tri-Capt to navigate the M/V BIG SAM was found by the Coast Guard, after the accident, to be in violation of 46 U.S.C. §405 in that he did not hold the proper license to navigate the tugboat in the waters where the accident occurred. The Coast Guard assessed a penalty against Tri-Capt for this violation.

The government, however, asserts that, in addition to Tri-Capt, Zito Towing should also be liable to it for the costs of the cleanup of the oil spill, as limited, because third-party liability should be read as joint and several for both the third-party vessel owner and operator. Section 1321(g) provides for liability on the "owner or operator." The statute, 33 U.S.C. §1321(a)(6), defines "owner or operator" as "in the case of a vessel, any person owning, operating, or chartering by demise, such vessel." And, according to the government, liability is joint and several because this definition provides inclusive, rather than mutually exclusive, alternatives. We disagree with the government's position. We read the statute as being in the disjunctive and giving a choice of parties, depending on the existing facts. Subsection (g) requires proof that the offending discharge was *caused* by the act or omission of the third party to be charged. This same language is carried through in the provision of exoneration from liability of the offending vessel in section 1321(f)(1), which requires the owner or operator to prove that the discharge was caused solely by the act or omission of a third party. Under our existing facts there is only one third party which caused the discharge and that is Tri-Capt. There could, of course, be circumstances where both owner and operator of a vessel are actually or technically at fault. But that is clearly not the case here.

The government also relies on the recent case of

United States v. LeBeouf Brothers Towing Company, 621 F.2d 787 (5th Cir. 1980), in support of its argument for joint liability on owner and operator, without more. In *LeBeouf*, a tanker barge owner sought to be exonerated under section 1321(f)(1) on the basis that the tugboat hired by LeBeouf to tow its tanker barge to a specified location was a "third party." The offending discharge occurred when a crewman of the hired tugboat accidentally opened the wrong valve on the tanker barge and discharged oil onto the Mississippi River. The Fifth Circuit was deciding the case under section 1321(f)(1), which provides that an "owner or operator of any *vessel from which oil* or a hazardous substance is discharged. . shall, notwithstanding any other provision of law, be liable to the United States Government ...." The court refused to let the owner of the tanker barge from which the oil was discharged out from liability for cleanup costs under section 1321(f)(1) because it recognized the legislative purpose in drafting section 1321(f)(1) as a strict liability statute. Therefore, the court refused to find that the tugboat was a "third party" for the purpose of relieving the owner of the vessel from which the oil spill occurred from liability. It found support for this in the case of *Burgess v. M/V Tamano*, 564 F.2d 964, 981-82 (1st Cir. 1977), in which the court similarly refused to find that a temporary local pilot, who negligently ran a supertanker into a submerged ledge in a Maine harbor, was a "third party" under section 1321(f)(1) for the purpose of relieving the owner of the supertanker from liability for the oil spill which occurred. This legislative purpose was also recognized by the Fifth Circuit in the *Dixie Carriers* case, supra at 739-740, where the court noted that the provision for limited recovery under section 1321(f)(1) was matched to strict liability, as compared to that section's provision for unlimited recovery with proof of willful conduct. That the intent was to impose strict liability on the discharging

vessel is clear from the legislative history, discussed as follows:

> Under absolute liability with limits, a vessel owner would be absolutely liable regardless of fault, but the injured party would be limited in the amount of the damages which could be collected. This approach avoids the difficult, if not impossible, task of proving negligence or rebutting the case for nonnegligence made by the vessel owner. It also places the risk on the responsible party, not on the general public.
>
> It should be noted that the insurance industry and the oil industry testified that they could not imagine a circumstance where a discharge of oil would occur without some degree of negligence. Therefore, it appears that negligent liability with a reverse burden of proof and absolute liability and similar in practical application. The practical advantage to absolute liability, of course, is that it would avoid litigation with the vessel owner on the question of responsibility.
>
> The oil pollution section deals only with the matter of clean up of discharges and costs associated therewith. The bill in no ways affects the right of third parties against the party causing the discharge.

S. Rep. No. 91-351, 91st Cong., 1st Sess. 5 (1969).

On the other hand, all parties agree that the case before us falls under section 1321(g), which provides that where an owner or operator of a vessel from which oil is discharged "proves that such discharge of oil... *was caused* solely by an act or omission of a *third party* ... such *third party* shall, not withstanding any other provision of law, be

liable to the United States Government for the actual costs incurred... for removal of such oil... or substance by the United States Government," subject to the same limitation as found in section 1321(f). The limitation provision does provide that, if the third party is the owner or operator of a vessel which causes the discharge of oil, the liability of such third party is based on the tonnage of the vessel owned or operated by the third party. This third-party situation refers to actual cause, and the legislative history reflects that it covers situations where a third party causes an unrelated, oil-carrying vessel to spill oil. *United States v. LeBeouf Brothers Towing Co.*, supra at 789; S.Rep.No. 91-351, 91st Cong., 1st Sess. 6 (1969). Additionally, in *LeBeouf*, the court found that LeBeouf had retained ultimate control over the tugboat which it hired to tow its barge and noted that the *Burgess* court also found that the local pilot was subject to the ultimate control of the ship and was acting for the ship. In the instant case, Zito Towing retained no control over the BIG SAM and the vessel was not on the business of the owner, Zito Towing. Our case, therefore, is factually distinguishable from these two cases which were decided under section 1321(f)(1).

Under the stipulated facts, there is no question that the third party which caused the oil spill in this case was Tri-Capt, the bareboat charterer and owner pro hac vice of the BIG SAM, and not Zito Towing, the owner of the vessel. Consequently, we cannot hold, as the government requests, that Zito Towing is liable to the government for cleanup costs under section 1321(g). We are aware that Tri-Capt is insolvent and the government may not be able to collect on a judgment against it. However, we cannot use this as an excuse to distort the language or history of the statute.

3. *Prejudgment Interest*

The United States requests the Court to grant prejudgment interest on the amount recoverable under the statute from the date of its expenditure of funds, for cleanup of the oil spill on June 24, 1975. The defendants object to an award of prejudgment interest, but basically on the facts of the case. It is their position that shortly after the underlying collision occurred, on April 25, 1975, the private litigation was initiated. Prior to trial of the suit, in February 1977, the United States made informal claim on the private litigants for cost of removal of the oil spill. Because the government was informed of the pending collision litigation and also was requested to intervene in it to present its claim and chose not to, the defendants feel that it should not be entitled to prejudgment interest at this time. It is argued that the government waited until January 10, 1978, almost a year after trial on the collision litigation then pending and three years after the actual collision and oil cleanup activity, to bring suit. Defendants take the position that since the government caused the delay between its expenditure of funds and the judgment in this litigation, interest should be allowed only from the date of this Court's judgment.

There is no question that, pursuant to 28 U.S.C. §1961, the United States is entitled to interest on its judgment. However, this applies only to interest on the judgment itself and leaves open the question of granting prejudgment interest as part of the compensation to be awarded the government. *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966). Two courts have dealt with this question. In *United States v. M/V Zoe Colocotroni*, 602 F.2d 12, 14 (1st Cir. 1979), also an action by the United States to recover the cost of oil spill cleanup,

the court held that the question of prejudgment interest on the government's unliquidated claim lay in its discretion and approved the award of prejudgment interest from the date the United States first presented a bill to defendants. Its decision was based on general principles of admiralty law. The court in *United States v. Malitovsky Cooperage Co.*, 472 F.Supp. 454 (W.D.Pa. 1979), also held that it had discretion as to whether to award prejudgment interest on an award to the government to cover the cost incurred in a cleanup operation. As in the *M/V Zoe Colocotroni* case, supra, this court awarded prejudgment interest from the date the Coast Guard made its demand on the defendant for payment of the bill for cleanup costs. However, the oil spill in the latter case occurred on land, oil having emanated from a steel drum-reconditioning plant. Although the court was confronted with the same statute, 33 U.S.C. §1321, it did not rely on principles of admiralty law to reach its decision. It relied on general principles of federal law, which, however, also rests the determination of awards of interest on unliquidated claims in the discretion of the court. On either basis the same conclusion was reached. Having found that Tri-Capt is solely liable to the government for the cost of cleaning up the oil spill which it caused, we are now left with a determination of this question of prejudgment interest. Agreeing that it is within our sound discretion, we also think that interest should be paid by Tri-Capt from the date claim was made on it by the United States in February of 1977, without making them responsible for the time lapse between the government's expenditure and its request for reimbursement. Also on the authority of both cited cases, *United States v. M/V Zoe Colocotroni*, supra at 14, and supra at 458, we award this interest at the legal rate prevailing in Louisiana, as requested by the United States.

Finally, the United States seeks to recover against Tri-Capt's liability for the penalty assessed against it by the Coast Guard under 46 U.S.C. §405, which has been previously described. We agree that Tri-Capt, Inc., is liable to the United States in the amount of $500 for violation of this statute. Accordingly,

IT IS THE ORDER OF THE COURT that there be judgment in favor of plaintiff United States of America against defendant Tri-Capt, Inc., under the Federal Water Pollution Control Act, 33 U.S.C. §1321, for $15,500, plus 7% interest from February, 1977, until paid.

IT IS THE FURTHER ORDER OF THE COURT that there be judgment in favor of plaintiff United States of America against defendant Tri-Capt, Inc., in the sum of $500, representing the penalty for violation of 46 U.S.C. §405.

IT IS THE FURTHER ORDER OF THE COURT that there be judgment in favor of defendants M/V BIG SAM and Zito Towing, Inc., and against the plaintiff United States of America, DISMISSING the plaintiff's suit against them.

Office-Supreme Court, U.S.
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1517 and 82-1541

In the Supreme Court of the United States

OCTOBER TERM, 1982

MISSION INSURANCE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

M/V BIG SAM, IN REM, and ZITO TOWING, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, precludes a remedy under general maritime tort law for the United States to recover oil-spill cleanup costs from a third party whose act or omission was the sole cause of the spill.

2. Whether the United States has a cause of action under general maritime tort law to recover its cleanup costs from such third party.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A29) and the opinion upon denial of rehearing and rehearing en banc (Pet. App. A30-A47) are reported at 681 F.2d 432 and 693 F.2d 451, respectively.[1] The

[1] The petitioners in this case have filed separate petitions seeking review of the same decision of the court of appeals. The appendices to the petitions are identical in content and

opinions of the district court (Pet. App. A48-A69, A70-A73, and A74-A86) are reported at 454 F. Supp. 1144, 480 F. Supp. 290, and 505 F. Supp. 1029, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1982. A petition for rehearing was denied on December 13, 1982. The petition for a writ of certiorari in No. 82-1517 was filed on March 12, 1983, and that in No. 82-1541 was filed on March 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act are set out at Pet. App. A1-A3.

STATEMENT

1. On April 25, 1975, the tug M/V BIG SAM collided with the barge T/B BUTANE on the Mississippi River. The BUTANE, in tow of another tug, was carrying oil, and the collision resulted in the discharge from the BUTANE of 280,000 gallons of oil into the river. The Coast Guard spent almost $300,000 to remove the spilled oil (Pet. App. A5-A6).

Following its cleanup of the oil spill, the United States brought this suit in the United States District Court for the Eastern District of Louisiana to recover its cleanup costs. Named as defendants were petitioner BIG SAM, in rem; petitioner Zito Towing, Inc., the owner of the BIG SAM; petitioner Mission Insurance Company, the insurer of the BIG SAM; Tri-Capt, Inc., the bareboat charterer and operator

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pagination, and therefore they will be referred to indistinguishably as "Pet. App."

of the BIG SAM at the time of collision; and the BUTANE and its owner. The government alleged causes of action under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. (& Supp. V) 1251 *et seq.*, the Refuse Act of 1899, 33 U.S.C. 407, and general maritime tort law (Pet. App. A6). The parties stipulated that the negligence of the BIG SAM was the sole cause of the collision (*id.* at A6-A7).

On defendants' motions, the district court dismissed all but the government's FWPCA claim (Pet. App. A70-A73). The court held that the FWPCA, 33 U.S.C. (Supp. V) 1321(g), constitutes the government's exclusive remedy for recovering oil-spill cleanup costs from a non-discharging third party whose sole fault causes the discharge and that other remedies are not preserved by 33 U.S.C. 1321(h)(2), which provides that "[t]he liabilities established by this section shall in no way affect any rights which * * * the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge * * *" (Pet. App. A3).

Under Section 1321(g), a third party that is the sole cause of the discharge of oil into the navigable waters of the United States is strictly liable (without proof of negligence) for the government's cleanup costs up to specified monetary limits; in addition, the third party is fully liable for such costs without limit if the "discharge was the result of willful negligence or willful misconduct within the privity and knowledge of such third party" (Pet. App. A1-A2).[2]

[2] This third-party liability under Section 1321(g) is in place of the liability of the discharger, who is subject to strict liability within certain limits, and to full liability for willful negligence or willful misconduct, unless it "can prove that a

At the time of the collision involved in this case, the limit on strict liability under the FWPCA was the lesser of $100 per gross ton of the vessel or $14,000,000 (*ibid.*).[3] Since the government did not allege willful negligence or willful misconduct within privity, the district court computed cleanup costs based on the 155-ton gross weight of the BIG SAM and entered a judgment for the United States in the amount of $15,500 ($100 per ton x 155 tons) (*id.* at A86).[4]

2. The government appealed the dismissal of its maritime tort claim for negligence.[5] The court of appeals reversed, holding that "any maritime tort remedy of the United States against the negligent vessel is not preempted by § 1321(g), in view of the express provision of 33 U.S.C. § 1321(h)(2) that the

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discharge was caused *solely* by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) *an act or omission of another party without regard to whether any such act or omission was or was not negligent* * * *." 33 U.S.C. (Supp. V) 1321(f) (Pet. App. A1) (emphasis added).

[3] These limits were increased by the 1977 FWPCA amendments to $125 per gross ton or $125,000, whichever is greater. Pub. L. No. 95-217, Section 58(d)(2), 91 Stat. 1595.

[4] The judgment was originally assessed only against Tri-Capt, the bareboat charterer and operator of the BIG SAM at the time of the collision (Pet. App. A78-A83). However, the court of appeals held that a third-party vessel in rem and its non-operating owner are liable jointly and severally, along with the operator who caused the accident, for cleanup costs under the FWPCA (*id.* at A14-A19). Petitioners have not sought review of that holding.

[5] The government also appealed the dismissal of its cause of action under the Refuse Act of 1899, 33 U.S.C. 407. The court of appeals upheld that part of the judgment, however, and we do not now seek further review.

liabilities established by the [FWPCA] 'shall in no way affect any rights which * * * the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance' " (Pet. App. A5). The court concluded that the plain language of Section 1321(h)(2) "unequivocably" states that the FWPCA does not exclude other remedies the government may have to recover its cleanup costs from sole-cause third parties (Pet. App. A24-A25), and it found nothing in the legislative history to indicate that the statute should not be read "according to its unambiguous expression" (*id.* at A25). Accordingly, the court held that "as against third parties * * * the United States may assert other causes of action than those established by subsection (g), or at least any others that are not inconsistent with the remedies thereby provided" (*ibid.*).

Applying this standard, the court of appeals reversed the dismissal of the maritime tort cause of action. First, the court had "little doubt" that recovery by the government for cleanup costs was "allowable under maritime law * * *" (Pet. App. A26). Second, the court expressed "little hesitation" in concluding that, in the circumstances of this case "such a [maritime tort] remedy is not inconsistent with the remedy provided by subsection (g) [of the FWPCA] * * * [and would] not thwart any Congressional purpose of the Act to protect vessel owners from potentially crushing liability and from an uninsurable risk" (*id.* at A27). This was so because there was no allegation that the BIG SAM's negligence had occurred with the knowledge and privity of its owner, and therefore any maritime tort liability would be confined by the Limitation of Liability Act (46 U.S.C.

183(a)) to the value of the vessel and its freight—a traditional measure of maritime tort liability against which vessels are insurable (Pet. App. A27-A28).[6] For these reasons, the court held that the FWPCA "did *not* preempt or exclude a remedy in simple-negligence maritime tort, subject to statutory limitation of liabilities, 46 U.S.C. Subsection 183(a)" (Pet. App. A24; emphasis in original).

3. The court of appeals denied petitions for rehearing and rehearing en banc (Pet. App. A30-A47). The panel "adhere[d] to its construction of subsections (g) and (h), as based on the unambiguous statutory language * * *—especially since the legislative history gives no reason to doubt that the legislative words mean precisely what they say" (*id.* at A31). The panel rejected petitioners' argument that its interpretation of the third-party-liability provisions of the FWPCA was inconsistent with decisions limiting the liability of dischargers to the statutory remedy in 33 U.S.C. (Supp. V) 1321(f) and precluding a maritime tort action against such dischargers, since the savings clause of subsection (h) applies by its terms only to third parties and not to dischargers. Moreover, the panel observed that third parties and dischargers were not similarly situated in practice and that the congressional concern to protect dischargers from "crushing potential liability against which insurance could not be procured because of the day-to-day exposure to risk

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[6] Because of the applicability of the Limitation of Liability Act, the court of appeals "expressly [did] not reach * * * [the] issue[], unnecessary for us to decide under present facts, * * * whether a maritime tort not subject to the limitation of liability because of the owner's knowledge or privity would be inconsistent with the remedy provided by the [Federal Water Pollution Control] Act for willful conduct or willful negligence" (Pet. App. A28).

of discharge in the transportation of oil" does "not necessarily implicate any inability of [third-party] vessels not engaged in such trade to secure insurance for tort damage resulting from collision with another vessel, whether or not it carried oil; or with crushing personal liability of the tort-causing vessel's owner in excess of the insurance limits, for these owners were already protected from such excessive exposure by the limitation of liability act, 46 U.S.C. § 183(a)" (Pet. App. A33-A34 n.5). Given these differences in "economic reality," it was not "illogical" or "inconsistent" to "conclude[] that third parties needed no such exclusive-liability feature [as had been applied in cases of dischargers] to obtain adequate insurance protection, as compared with those in the category of dischargers, who are exposed daily (rather than exceptionally) to the risk of causing oil-pollution damage" (*id.* at A36 & n.8). Emphasizing that "it is simply not part of our function as judges to re-write, in the guise of statutory construction, unambiguous statutory language" (*id.* at A36-A37), the panel explained that any problems arising from "this complicated legislation compromising conflicting interests" would be "for Congress to correct * * *, not the courts" (*id.* at A31 & n.1).

Four of the 13 active circuit judges dissented from the denial of rehearing en banc (Pet. App. A40). Although "in no sense certain that the panel opinion's construction, founded as it is on the rock of a literal reading of the statute, is incorrect" (*id.* at A41), the dissenters believed that the difference in the panel's treatment of third parties and the treatment of dischargers in an earlier Fifth Circuit decision was "sufficiently anomalous" (*id.* at A40) to call for consideration "by the en banc court, which exists to * * * harmonize panel decisions of our court" (*id.* at A41).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. The court of appeals correctly construed the plain language of Section 1321(h)(2) to preserve the traditional maritime tort remedies available to the government against third parties who cause oil spills. As the court noted, Section 1321(h)(2) unambiguously states that the liabilities created by the FWPCA "shall *in no way* affect *any* rights which * * * the United States Government may have against *any third party* whose actions may in any way have caused or contributed to the discharge of oil" (Pet. App. A3) (emphasis added). The court of appeals thus followed this Court's directive to "assume 'that the legislative purpose is expressed by the ordinary meaning of the words used' * * * [and that], '[a]bsent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'" (Pet. App. A37, quoting *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982) (citations omitted)). Petitioners have pointed to nothing in the legislative history that "clearly expresse[s]" Congress' intent to exclude traditional maritime remedies against a sole-cause third party from the broad and manifest sweep of Section 1321(h), and those remedies therefore have not been displaced. See Note, *Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs*, 93 Harv. L. Rev. 1761, 1778 (1980).

This reading of the plain language of Section 1321(h) to preserve traditional maritime tort remedies against sole-cause third parties is also supported

by the settled rule of construction that remedial environmental and safety legislation "is to be liberally construed to effectuate the congressional purpose." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980). To be sure, as the court below recognized (Pet. App. A31 n.1), the oil spill cleanup provisions of the FWPCA represent "complicated legislation compromising conflicting interests"; nevertheless, the evident purpose of the statute is to discourage the discharge of oil into the navigable waters of the United States and to provide for the cleanup of such spills without unnecessary and excessive expense to the public. See, *e.g.*, 33 U.S.C. (Supp. V) 1321(b)(1); 116 Cong. Rec. 9004 (1970) (remarks of Sen. Randolph) ("[T]he oil industry and oil shippers will bear the risk of cleanup of oil spills rather than the public. The conference measure * * * [provides] effective protection of the public interest"). By eliminating a traditional remedy for maritime torts, petitioners' narrow interpretation of the Act serves to impede this purpose and allows a tortfeasor to avoid the usual consequences of its actions. Such a constricted view of the statute is especially inappropriate where, as here, it would defeat pre-existing rights conferred upon the sovereign for the benefit of the Nation as a whole (cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 272 (1947); *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 170-171 (1909))[7] and would

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[7] Petitioners in No. 82-1541 contend (Pet. 18-23) that the United States does not have standing under maritime law to bring a claim to recover its cleanup costs. This contention is without merit. When the government, in the exercise of its authority to maintain navigable waterways, expends funds to remove oil tortiously spilled by another, it is clearly entitled to restitution from the responsible party; contrary to peti-

"upset a 'long-established and familiar principle' of maritime law" (*Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 263 (1979), quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)).[8]

2. In asserting that the plain language of the statute should be disregarded, petitioners rely (82-1517 Pet. 15-19; 82-1541 Pet. 6-8) on cases construing the FWPCA to preclude the government's traditional maritime tort remedy against dischargers on the ground that 33 U.S.C. (Supp. V) 1321(f) provides the exclusive basis for recovery of cleanup costs

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tioners' argument, ownership of the river or riverbed is immaterial, since the government is seeking to be compensated for the expenditure of public funds necessitated by the wrongful discharge. The only other court of appeals to address this issue found, consistent with the decision below, that "[o]il pollution in navigable waters has been deemed a tort for which the United States is entitled to damages." *United States* v. *City of Redwood City*, 640 F.2d 963, 969-970 (9th Cir. 1981). Relying on *Redwood City* and on academic commentators, the court of appeals in the present case correctly concluded (Pet. App. A26-A27) that the United States could bring "an action to recover damages by way of cleanup costs * * * under maritime law for a maritime tort."

[8] Of course, it cannot be doubted, as petitioners urge (82-1517 Pet. 6, 9-12; 82-1541 Pet. 6, 10-18), that an Act of Congress may override federal common law. See, *e.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). The question presented here, however, is whether the provisions of the FWPCA do in fact supersede the government's right of action against a sole-cause third party under traditional maritime law. This is an issue of statutory construction that, as demonstrated above, Congress explicitly resolved in Section 1321(h) in favor of preserving the traditional tort remedy. Thus, the court of appeals' decision in no way conflicts with either the approach or the result in such cases as *City of Milwaukee* v. *Illinois*.

from dischargers. See *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981), and *Steuart Transportation Co.* v. *Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979).[9] Noting that the liability standards under the FWPCA are virtually identical for dischargers (33 U.S.C. (Supp. V) 1321(f)) and third parties (33 U.S.C. (Supp. V) 1321(g)), and submitting that Congress could not have intended to allow greater liability for third parties than for dischargers, petitioners argue that the ruling below is erroneous and creates a conflict among the circuits. Accepting for present purposes (but without conceding) the correctness of *Oswego Barge* and *Steuart Transportation* with respect to dischargers, however, those decisions do not compel a different result in this case or conflict with the decision below regarding third parties.

The central factor influencing the court of appeals' ruling, which petitioners' argument ignores, is 33 U.S.C. 1321(h)(2). By its terms, Section 1321(h)(2) is applicable only to rights of the United States against a "third party" and not against a discharger (Pet. App. A3). Moreover, the Act contains no provision analogous to Section 1321(h)(2) in the case of a discharger. Indeed, the decisions in *Oswego Barge* (664 F.2d at 339, 341), *Steuart Transportation* (596 F.2d at 615-618), and *Dixie Carriers* (627 F.2d at 739, 742) explicitly noted the absence of a

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[9] Petitioners also rely on *United States* v. *Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980). However, any intra-circuit conflict between that case and the decision below does not call for this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). At all events, *Dixie Carriers*, like the *Oswego Barge* and *Steuart Transportation* decisions discussed in the text, does not cast doubt upon or conflict with the holding in this case.

savings clause with respect to causes of action against dischargers and contrasted that statutory scheme with the provisions applicable to third parties. Thus, whatever the correct construction of the discharger provision of Section 1321(f) in the absence of any savings clause, Section 1321(h)(2) makes clear, as held by the court below, that the FWPCA does not limit the United States to its third-party remedy under Section 1321(g) but instead preserves the government's traditional maritime tort action against such third parties. See also *United States* v. *City of Redwood City*, 640 F.2d 963, 969-970 (9th Cir. 1981).[10]

In addition to this difference in the terms of the statute, there also is no reason to expect, as petitioners suggest, that the Act must treat dischargers and third parties in an identical fashion. Nothing in the text or history of the FWPCA requires such identity of treatment, and, as the court of appeals explained (Pet. App. A33 n.5, A36 n.8), different "economic realit[ies]" (*id.* at A36 n.8) regarding risk and insurability pertain to these two groups. Moreover, even under petitioners' construction, differences would remain between dischargers and third parties.

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[10] Because Section 1321(h)(2) is the relevant provision here in deciding whether the United States may pursue third-party remedies outside the FWPCA, it is immaterial that Sections 1321(f) and (g) use virtually identical language in establishing discharger and third-party liability under the Act. Furthermore, the most reasonable explanation for this similarity in language—that Congress sought to ensure that a third party would be no less liable under the Act than the discharger if the latter avoided liability on the ground that the discharge "was caused solely by * * * an act or omission of a third party" (33 U.S.C. (Supp. V) 1321(f)(1); Pet. App. A1)—sheds no light on the availability of traditional maritime remedies apart from the FWPCA.

For example, third-party liability pursuant to the FWPCA is imposed only where the third party caused the discharge "solely" by its act or omission or in combination with other enumerated (and limited) factors (33 U.S.C. (Supp. V) 1321(g); Pet. App. A2); with respect to a partial-cause third party the Act does not apply, and in those circumstances there can be no doubt that the government may pursue its traditional maritime tort remedy against the third party even assuming arguendo that it could not do so against the discharger. See *United States* v. *City of Redwood City*, *supra*, 640 F.2d at 968-970. Accordingly, petitioners' proffered construction does not resolve the asymmetry between dischargers and third parties.

Finally, contrary to petitioners' suggestion, we note that the government's remedy against a negligent third party under maritime tort law is not merely duplicative of its statutory FWPCA remedy for "willful negligence or willful misconduct" (33 U.S.C. (Supp. V) 1321(g); Pet. App. A2). Under the FWPCA, for example, the government is entitled to recover its "actual costs incurred" (33 U.S.C. (Supp. V) 1321(g); Pet. App. A2), while traditional maritime law "requires the government to justify its [cleanup] expenditures." Note, *Oil Spills and Cleanup Bills*, *supra*, 93 Harv. L. Rev. at 1777. In addition, "where the FWPCA [33 U.S.C. 1321(p)] makes the federal government the sole beneficiary of the assets it provides for recovery, * * * [maritime law (46 U.S.C. 184)] permits the government to claim but a proportional share" of the amount available for recovery (93 Harv. L. Rev. at 1777). Thus, by pursuing its maritime tort remedy against a third party

for negligence, the government forgoes certain special advantages provided by the FWPCA in cases of "willful negligence or willful misconduct." [11]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1983

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[11] We also reiterate that in this case there is no issue of unlimited liability because, as the court below recognized (Pet. App. A24, A27-A28, A32-A34 nn.3-5), petitioners are able to invoke the protections of the Limitation of Liability Act, 46 U.S.C. 183(a). We do point out, however, that even under petitioners' reading of the statute it is possible for a negligent third party to be subject to liability beyond the limits specified in Section 1321(g)—for example, if a state rather than the federal government undertook the cleanup and sought to recover its costs. See 93 Harv. L. Rev. at 1779-1782. For this reason, third parties generally will need insurance coverage beyond the FWPCA limits provided for federal recovery against non-willful defendants.

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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1982

MISSION INSURANCE COMPANY

Petitioner

Versus

UNITED STATES OF AMERICA

Respondent

BRIEF OF AMICUS CURIAE WATER QUALITY INSURANCE SYNDICATE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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UNITED STATES OF AMERICA

Respondent

BRIEF OF AMICUS CURIAE WATER QUALITY INSURANCE SYNDICATE IN SUPPORT OF MISSION INSURANCE COMPANY'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Amicus Curiae Water Quality Insurance Syndicate respectfully joins Petitioner, Mission Insurance Company, in praying that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on July 30, 1982.

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STATEMENT OF THE ISSUE

Is the government's remedy under 33 U.S.C. §1321 (g) for pollution clean-up expenses against third parties whose simple negligence is the sole cause of the discharge of oil or other hazardous substances into the navigable waters of the United States an exclusive remedy, precluding resort to a general maritime law tort remedy which circumvents the FWPCA's tonnage limits?

STATEMENT OF INTEREST OF AMICUS CURIAE

Water Quality Insurance Syndicate (WQIS) is a group of major American and European companies which have formed a syndicate to insure the liabilities of American vessel owners and operators under the Federal Water Pollution Control Act (FWPCA). WQIS insures the great majority of American river and harbor craft against FWPCA and general maritime tort liability for pollution damage.

The decision of July 30, 1982 by the United States Court of Appeals, Fifth Circuit, in *United States vs. M/V BIG SAM, in rem,* et al, (hereafter "BIG SAM"), 681 F.2d 432 (5th Cir. 1982) rehearing denied December 13, 1982, 693 F.2d 451 (5th Cir. 1982), restricts the exclusivity of FWPCA to subsection (f) of 33 U.S.C. §1321, i.e., to discharging vessel owners and operators, and denies exclusivity to subsection (g), thus making available to the government a general maritime tort remedy against third party sole fault non-discharging vessel owners and operators, depriving them of the tonnage limitation of liability of the FWPCA. WQIS has a vital interest in this litigation because of the increased exposure under its policies resulting from the decision in the captioned case.

The impact of BIG SAM on insurers under the FWPCA is compounded by the difficulty which the lower courts have experienced in defining the term "third party", particularly in towage situations. Under the present state of the law it is not possible for pollution insurers and their assureds to define the parameters of their exposure for clean-up costs, a situation which Justice Rehnquist describes, in his dissent to the denial of certiorari in *Hollywood Marine, Inc. and Water Quality Insurance Syndicate v. United States*, 451 U.S. 994 (1981), as justifying "the Court granting certiorari and giving the issue plenary consideration at this time".

SUMMARY OF ARGUMENT

1.

The Court of Appeals has adopted a theory of unlimited liability based on simple negligence which was considered and rejected by Congress.

2.

Subsection (h) of 33 U.S.C. §1321 can be interpreted to serve three separate and distinct purposes without ignoring the tonnage limitation of subsection (g) as is done by BIG SAM.

3.

By refusing to interpret subsections (f) and (g) as providing similar exclusive remedies in the absence of willful negligence, BIG SAM has created uncertain cleanup liabilities for insureds and insurers in collision and towage situations.

ARGUMENT

In the wake of the Torrey Canyon disaster in 1967 and the Santa Barbara oil spill in 1969, the Congress undertook to draft legislation which would serve the public need for petroleum products as well as the public need for protection of the environment. The Federal Water Quality Improvement Act of 1970 amended and was incorporated within the Federal Water Pollution Act of 1948, 33 U.S.C. §1161 (1970). This legislation was amended by the Federal Water Pollution Control Act amendments of 1972 (FWPCA) 33 U.S.C. §1251, *et seq.* The subsections of this legislation which are relevant to this case are 33 U.S.C. §1321(f), (g) and (h).

The legislative history of these sections reflects a careful balancing of competing interests, the most critical aspect of which is the extension of the tonnage limitation and the elimination of an inconsistent general maritime law remedy. Congress' decision to amend the FWPCA in 1972 was motivated by its recognition that existing statutory and federal maritime law was inadequate to preserve the integrity of U.S. waters.[1] In drafting the FWPCA amendments, Congress was acutely aware of two competing interests, both vital to the nation's prosperity: (1) the need for clean water, and (2) the need for oil. Overzealous devotion to either interest detracts from the other, possibly with disastrous consequences. The nation could best obtain clean water at no expense to the government by imposing upon the shipping industry full responsibility for costs of cleanup. The result undoubtedly would be a shortage of oil occasioned by the inability of many carriers to stay in business under economically burdensome conditions,

[1] 116 Cong. Rec. 9332 (1970); 3 EPA Legal Compilation 1995 (1973).

or exorbitantly expensive oil priced to defray the costs of unlimited clean-up responsibility. The public would then share the cost of oil spills indirectly through higher prices at the pump. The statute which ultimately was enacted represents a compromise between the two competing needs of the nation.

The legislative history shows that Congress decided that these competing needs could best be harmonized through legislation which struck a reasonable balance by guaranteeing the government some recoupment of cleanup costs in all cases by permitting recovery without the need of proving negligence. The *quid pro quo* for strict liability was a tonnage limit on that liability unless willful negligence caused the spill. In reaching this conclusion, Congress considered four factors:

> (1) [T]he effect of to rigid a liability test on maritime commerce; (2) the availability of insurance for any specific amount or type of liability; (3) the economic impact of any specific amount of liability on the owner of the vessel, the shipper of the oil and the consumer; and (4) the impact of a burdensome liability test on the U.S. Government and the people of the United States. Report of Senate Committee on Public Works No. 911-351, 91st Cong., 1st Sess. (1969) at p. 5.

These factors demonstrate that, although Congress did not wish to unduly burden the public sector, it wished to avoid crippling the shipping industry which serves a vital public need.

Congress considered four different approaches to cleanup expenses:

(1) Absolute liability with unlimited recovery;
(2) Liability predicated on negligence with limited recovery;
(3) Liability predicated on negligence with unlimited recovery; and
(4) Absolute liability with limited recovery.

Congress selected a modification of the fourth approach which accorded the government the right to collect cleanup costs (within the defined limits of liability) without having to prove that negligence caused the spill and which furnished dischargers and third parties four avenues of escape—an approach Congress deemed the best available and most utilitarian. The limited liability aspect of the bill was crucial to its enactment as reflected in the words of Senator Cooper:

> Consistent with the philosophy of absolute liability, limits of liability are provided. This is an important provision, which I consider draws a proper balance between the public interest and the ability of private enterprise to respond. I think it should be pointed out that the provision was adopted only after the most careful consideration and thorough study. 116 Cong. Rec. 9003 (1970); 3 EPA Legal Compilation 1967 (1973).

Congress recognized that any other approach placed too great a demand on the private sector which inevitably would visit a reciprocal disadvantage on the public sector in the form of lack of oil or unaffordably high oil prices. The burden on the private sector is the same regardless of whether the responsible party is the subsection (f) discharger or the subsection (g) third party.

Because a statute should be given a meaning which

carries out its purpose[2] and because, conversely, a statute should not be construed in a manner which frustrates its clear-cut purpose,[3] subsection (g) should be interpreted to effectuate Congress' intent to strike a proper balance. *United States vs. Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980), and *Steuart Transp. Co. vs. Allied Towing Corp.*, 596 F.2d 609 (1st Cir. 1979), found that subsection (f) must be interpreted to be the exclusive remedy because to do otherwise would upset that balance. Because subsections (f) and (g) are virtually identical, there is no compelling reason to justify an interpretation of subsection (g) inconsistent with *Dixie Carriers* and subsection (f) and which would patently upset the balance intended by Congress.

THE COURT OF APPEALS HAS ADOPTED A THEORY OF UNLIMITED LIABILITY BASED ON SIMPLE NEGLIGENCE WHICH WAS CONSIDERED AND REJECTED BY THE CONGRESS.

The FWPCA's legislative history reflects a clearly articulated balance of competing interests. Congress specifically considered the option of providing for strict liability with accompanying tonnage limits when fault could not be established and tort liability with unlimited recovery if fault could be established. Congress' rejection of that approach ought to preclude an interpretation of the FWPCA producing that precise result, but that rejected approach is precisely what BIG SAM adopts.

U.S. v. Dixie Carriers, Inc., supra, relying on the

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[2] *United States v. State of Maryland*, 349 F.2d 693, 695 (D.C. Cir. 1965).

[3] *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261; 87 S.Ct. 492, 497 (1966).

same legislative history, recognized that subsection (f) was an exclusive remedy. Subsection (g) is descended from the same lineage as subsection (f), and must be likewise an exclusive remedy.

The choice of absolute liability with limited recovery was not easily made. The form which the FWPCA finally assumed resulted from extensive legislative debate, disagreement and compromise.[4] The House and the Senate initially were unable to agree and a conference of members from the Senate and the House was appointed to hammer out a compromise.

When Congress first considered pollution cleanup legislation, the House and the Senate chose divergent paths. The House bill allowed recovery upon a showing of simple negligence, and reversed the burden of proof. No reference to third parties appeared in the bill. The Senate bill was similar to the bill ultimately enacted. It imposed strict liability with tonnage limits, but allowed *unlimited* recovery upon a showing of *simple* negligence.[5] §12(f)(l) of the Senate bill was aimed only at the discharger and created the same four avenues of escape that are found in the statute as enacted, including the act or omission of a third party irrespective of fault. The Senate bill did not address the impact of a sole-cause third party, did not substitute such a third party for the discharger and consequently did not contain a parallel to subsection (g) of the FWPCA. The Senate bill did, however, have a provision

[4] See, *e.g.*, 116 Cong. Rec. 8984 (1970); 3 EPA Legal Compilation 1966 (1973).

[5] See §12(f)(l) of the Senate bill which corresponds to subsection (f) of the FWPCA. The relevant portions of §12(f)(l) are found in Appendix A *infra*.

similar to subsection (h).[6]

Since neither §12(f)(l) nor any other provision of the Senate bill regulated the government's claim against third parties, the Senate bill did not have exclusivity impact on the government's general maritime law tort remedy against third parties. §12(l) (subsection (h)'s counterpart), therefore, was not and could not have been designed to preserve remedies otherwise excluded. Rather §12(l) could only have been designed to confirm that the statute did not exclude remedies and causes of action not addressed in the liability portion of the statute, *i.e.*, §12(f)(l).

When the FWPCA amendments emerged from conference, the bill ultimately enacted retained the Senate bill's strict liability feature, granted unlimited recovery but only for willful negligence and added subsection (g) to substitute a sole-cause third party, who otherwise would go unscathed if without fault, for the discharger. §12(l) of the Senate bill was retained as subsection (h), and, like its counterpart, was designed to confirm that the statute did not exclude remedies and causes of action that were not addressed in the liability portion of the statute, *i.e.*, subsections (f) and (g). Consequently, the legislative history of subsection (h), as manifested in the evolution of the statute, does not support the BIG SAM panel's statement that the "legislative history...affords no reason not to read this statute according to its unambiguous expression." 681 F.2d at 442. To the contrary, the evolution of subsection (h) strongly suggests that it serves only to preserve remedies that are *not* addressed in subsection (g).

Where the final version of a bill rejects the approach

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[6] See §12(l) which is quoted in the BIG SAM opinion, 681 F.2d at 443.

taken in an earlier draft, courts have refused to adopt an interpretation which adheres to the rejected language, observing that the rejection "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). See also *Pan American World Airways, Inc. v. C.A.B.*, 380 F.2d 770 (2d Cir. 1967), where, in considering a statute which also resulted from conference, the Court stated:

> We do not agree. That Congress has adopted the House version of the bill, specifically rejecting the Senate's conflicting version, is of course an extremely significant factor in determining what was Congress' intention with respect to the matters in issue. It would be foolish indeed to disregard the one source of legislative history that explains the reasons for the conference committee's action. (citations omitted) 380 F.2d at 781.

Because Congress rejected the Senate's approach, the *Gulf Oil* and *Pan American* decisions preclude the BIG SAM interpretation which reinstates the rejected Senate approach.

SUBSECTION (h) CAN BE INTERPRETED TO SERVE THREE SEPARATE AND DISTINCT PURPOSES WITHOUT IGNORING THE TONNAGE LIMITATION OF SUBSECTION (g).

To give effect to subsection (h) the panel in BIG SAM concluded that, as to third parties, subsection (g) has no meaning.

It is respectfully submitted that the Court's "single-

minded focus on the language of subsection (h)"[7] does unnecessary violence to the statute. Subsection (h) can be read in relation to subsection (g) and both can be given meaning. The concept of exclusivity articulated in *U.S. v. Dixie Carriers, Inc., supra*, the linguistic and conceptual identity of subsections (f) and (g), and the canons of statutory construction can be adhered to by reading subsection (h) as serving one or more of the following purposes which do not negate subsection (g):

> First—Subsection (h) preserves the government's remedies against third parties for damages other than cleanup costs (e.g., oil spill damage to government property).
>
> Second—Subsection (h) preserves the government's remedies for abatement of a nuisance.
>
> Third—Subsection (h) permits the government to join in one suit all potentially responsible parties—dischargers, third parties and, if indicated, fourth parties—thereby avoiding a proliferation of litigation which overly burdens the courts.

The first suggestion is based upon the distinction between cleanup costs and property damage. Subsection (h) makes it clear that the government may proceed against a third party to recover any physical damages to government property which the government may sustain as the result of an oil spill.

The second suggestion recognizes that there may be instances in which continuing behavior results in spillage.

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[7] The quoted language is taken from the dissent of Judges Gee, Brown, Rubin and Jolly to the Fifth Circuit's denial of a Rehearing en Banc. 693 F.2d at 459.

Subsection (h) preserves the government's right to seek injunctive relief against third parties to abate a nuisance.

The third suggestion is procedural and avoids a potentially endless litigation wherein the government may first proceed against the discharging vessel only to find that a third party caused the spill and then may bring a second suit or amend its complaint to bring in the third party only to find that a fourth party was the cause and so on. *United States v. LeBoeuf Bros. Towing Co.*, 621 F.2d 787 (5th Cir. 1980), suggests that subsection (f) requires the government to proceed first against the discharging vessel alone. Indeed a literal reading of the statute requires this conclusion. Subsection (h) permits the government to name all potentially responsible parties in one litigation.

BY REFUSING TO INTERPRET SUBSECTIONS (f) AND (g) AS PROVIDING SIMILAR EXCLUSIVE REMEDIES IN THE ABSENCE OF WILLFUL NEGLIGENCE, BIG SAM HAS CREATED UNCERTAIN CLEAN-UP LIABILITIES FOR INSUREDS AND INSURERS IN COLLISION AND TOWAGE SITUATIONS.

By differentiating between the protection afforded by subsection (f) and subsection (g), BIG SAM has created uncertainty and confusion never intended by Congress. The difference BIG SAM creates between the two subsections highlights the confusion in the decisions of the lower courts in defining the term "third party" in subsections (f), (g) and (h). The decisions of the lower courts relating to whether the tower of a spilling vessel is a third party presented serious difficulties even before BIG SAM. The difficulties are now compounded, for under BIG SAM the consequences to the towing vesel categorized as a third party result in unlimited liability for clean-up costs even

though the towing vessel is not guilty of willful negligence. The decisions of the lower courts create anomalies only this court can resolve.

In *Complaint of Tug OCEAN PRINCE, INC., et al. v. United States*, 436 F.Supp. 907, 923,24 (S.D.N.Y. 1977), affirmed in part, reversed in part on other grounds, 584 F.2d 1151 (2nd Cir. 1978), certiorari denied, 440 U.S. 959 (1979), it was held that the towing vessel is a "third party" for purposes of the discharging vessel's subsection 1321 (f)(l) defense. However, in *United States v. LeBeouf Bros. Towing Co., Inc.*, 621 F.2d 787 (5th Cir. 1980), the Fifth Circuit held that the towing vessel is not a "third party" whose sole fault relieves the discharging barge of liability under subsection (f). Further confusion is found in *The Matter of the Complaint of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc.*, decided by U.S. District Court for the Southern District of New York, [Memorandum Opinion and Order of February 11, 1983; 78 Civ. 3552 (ADS)][8], in which the tug GRACE MORAN caused the grounding and total loss of the dredge PENNSYLVANIA. In a suit by the United States for clean-up costs, the court said:

> Moran is undoubtedly a third-party under subsection (h)(2). As detailed in opinions by the Fifth and First Circuit a narrow reading of the sole-cause "third-party" exception in subsection 1321 (f) is justified by the statute's purpose of assuring government reimbursement for clean-up costs by holding discharging vessels strictly liable. See United States v. LeBeouf Bros. Towing Co., 621 F.2d 787 (5th Cir.) rehearing denied, 629 F.2d 1350 (1980), certiorari denied, 452 U.S. 906 (1981); Burgess v. M/V TAMANO, 564 F.2d

[8] The decision is reproduced in Appendix B *infra*.

> 964, 981-82 (1st Cir. 1977), certiorari denied, 435 U.S. 941 (1978). This purpose is not served by narrowly construing the reference to "third party" in subsection 1321 (h)(2); rather, a broad construction of the term in subsection (h)(2) serves the purpose of the statute in the same way a narrow reading of the term in subsection (f) does: by providing another source from which the government may attempt to procure reimbursement for clean-up expenses. (See Appendix B at A-11 *infra*)

The insurance industry is entitled to know, at the very least, what the term "third party" means and whether it means different things under different sections of the same statute.

The confusion in the decisions of the lower courts' interpreting the third-party defense in subsection (f) can best be resolved by this Court. BIG SAM injects added urgency into the need for clarification. To delay a resolution of this conflict only causes the shipping and insurance industries to incur added legal expenses which are ultimately borne by the taxpayer.

In *U.S. v. Hollywood Marine, Inc., et al.*, 625 F.2d 524 (5th Cir. 1980), cert. den. 451 U.S. 994 (1981), certiorari was denied in a case in which the Fifth Circuit Court of Appeals, consistent with its *LeBeouf* opinion, 621 F.2d 787 (1980), concluded that the towing vessel was not a third party for purposes of the spilling vessel's §1321 (f) (l) defense. In dissenting from the denial of certiorari, Justice Rehnquist observed:

> Insurance policies and contracts, unlike actual collisions, are frequently matters which are entered into consensually for a period of months

> or years in reliance upon one or another construction of applicable law. This factor is sufficiently important that when combined with the recognized importance of the enterprise being conducted and the evil at which the legislation is aimed to justify the Court granting certiorari and giving the issue plenary consideration at this time.

The purposes which Congress intended in enacting FWPCA will be substantially advanced if this Court resolves the anomaly so clearly apparent in BIG SAM.

CONCLUSION

BIG SAM, in ignoring the tonnage limitation of subsection (g), destroys the balance intended by Congress in making the subsection (g) third party the surrogate of the subsection (f) spilling vessel. The impact of BIG SAM is compounded by the difficulties which the lower courts have experienced in deciding who is and who is not a third party. The compelling need for clarification by this Court is apparent.

RESPECTFULLY SUBMITTED,

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APPENDIX "A"

Section 12(f)(l) of the Senate bill which corresponds to 33 U.S.C. §1321(f):

> Except where an owner or operator can prove that a discharge was caused solely by (a) an act of God, (b) an act of war, (c) negligence on the part of the United States Government, or (d) an act of third party, such owner or operator of any vessel from which oil is discharged, or which causes the discharge of oil...shall, notwithstanding any other provision of law, be liable to the United States Government for the actual cost incurred under subsection (e) for the removal of such oil by the United States Government in an amount not to exceed $125 per gross ton of such vessel or $14 million, whichever is lesser, except that where such discharge was the result of negligence or a willful act, such owner or operator shall be liable to the United States Government for the full amount of such costs. Report of Senate Committee on Public Works No. 91-351 at p. 105 (1969).

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

MEMORANDUM OPINION
AND ORDER
78 Civ. 3552(ADS)

The Complaint of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc., as Owner and Bareboat Charterer, Respectively of Tug GRACE MORAN, for Exoneration from or Limitation of Liability.

(Filed Feb. 14, 1983)

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ABRAHAM D. SOFAER, D.J.:

On July 31, 1978 the tug *Grace Moran* and its tow the dredge *Pennsylvania* ran aground on a shoal off rockaway Point known as Louie's Hump. The *Pennsylvania* subsequently sank and became a total loss. Members of its crew allegedly suffered personal injuries, and the United States spent $235,000 to clean-up oil which spilled from the dredge's fuel tanks. Following ten days of trial and one day of argument, this Court denied a petition to exonerate or limit the liability of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., respectively the owner and the bareboat charterer of the *Grace Moran* (hereinafter collectively referred to as "Moran"). The Court further found Moran 65% at fault and American Dredging Company (hereinafter "ADC"), the owner of the dredge *Pennsylvania*, 35% at fault for all damages resulting from the accident, including the expenses incurred by the United States in cleaning up the oil spill.

Following appeals by the various parties, the case has been remanded by the Second Circuit for two purposes: first, to determine whether ADC may claim that Moran's breach of a warranty of workmanlike service ("WOWS") precludes ADC liability and, if so, whether that claim has merit; second, to clarify whether and to what extent Moran

may be held liable for the government's oil-spill cleanup expenses under § 1321 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1321.

I.

ADC's claim concerning Moran's breach of WOWS was not preserved in the form that it was asserted on appeal. ADC did not claim at trial that Moran's breach entitled it to recover irrespective of its own negligence. This Court—and all the parties including ADC—treated the breach of WOWS claim during and after the trial as an additional argument against Moran's petition to avoid or limit its liability. The Court found Moran liable without limitation on other grounds and, accordingly, did not mention the WOWS claim in its oral opinion. Although the Court invited corrections to its opinion, ADC did not object to the Court's failure to divine ADC's allegedly broader purpose from its pretrial submissions. *See Desert Palace, Inc. v. Salisbury,* 401 F.2d 320, 323-24 (7th Cir. 1968).

Appeals based on "claims and defenses that were pleaded but not properly pursued in the trial court" should not be allowed "except in the most extraordinary circumstances to prevent a miscarriage of justice." *Broadway Delivery Corp. v. United Parcel Service,* 651 F.2d 122, 126 (2d Cir. 1981). There is no miscarriage of justice in not allowing ADC to attempt to avoid liability for its share of fault for the damages in this case.

ADC's assertion that Moran's breach of WOWS precludes ADC liability is tenuous under existing law. In *Fairmont Shipping Corp. v. Chevron International Oil Co., Inc.,* 511 F.2d 1252, 1260 (2d Cir. 1975) the Second Circuit

suggested that a tow could not be held liable for contributory negligence (short of "active hindrance") once it was established that damages had been caused in part by a tug's breach of WOWS. In *Navieros Oceanikos, S.A. v. S.T. Mobile Trader,* 554 F.2d 43, 46-47 (2d Cir. 1977), however, the Circuit Court held that a breach of WOWS does not generally preclude consideration of a plaintiff's contributory negligence. *Navieros* did suggest in dicta that, where personal injury damages exposed a plaintiff to liability without fault under the unseaworthiness doctrine, WOWS doctrine might require indemnification regardless of the plaintiff's own fault. 554 F.2d at 46-47; *see Gaymon v. Prudential Lines, Inc.,* 473 F.Supp. 161, 164-65 (S.D.N.Y. 1979). ADC's reliance on this suggestion in *Navieros* is questionable, however, given recent developments in maritime law. The fact that ADC might be strictly liable to injured seamen hardly justifies a rule that would allow it to avoid completely its own fault. The Supreme Court's decision in *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975) plainly condemns such a rule by its emphatic declaration that damages in admiralty should be allocated in accordance with fault. 421 U.S. at 410-11; *see Hanover Insurance Co. v. Puerto Rico Lightrage Co.,* 553 F.2d 728, 730 & n.3 (1st Cir. 1977); Note, *Towage Accidents and the Implied Warranty of Workmanlike Service: A New Strict Liability?,* 10 Ga. L. Rev. 794, 815 (1976).

The nature of ADC's faults, moreover, makes ADC's possible avoidance of its share of liability particularly unjust. Under the WOWS indemnity theory urged by ADC, ADC could be held liable only if its faults constituted "active hindrance." The seriously negligent omissions of ADC do not appear to constitute "active hindrance" as that concept has been interpreted. *See Rodriguez v. Olaf Peder-*

sen's Rederi A/S, 527 F.2d 1282 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *Albanese v. N.V. Nederlande Amerik Stoomy. Maats*, 346 F.2d 481 (2d Cir.), *rev'd on other grounds*, 382 U.S. 283 (1965). But ADC's omissions may have had even more serious consequences than many forms of "active hindrance"; its omissions (*i.e.* the crew's failure to warn of the shoal and of the need to prevent resumption of tow as well as the dredge's open doors and lack of compartments) made what would have been a serious accident into an unsalvageable disaster. Moreover, the dredge was unseaworthy because of its lack of a valid certificate for oceangoing operations under 46 CFR § 90.05-25. This omission constituted a statutory violation, and the Second Circuit has emphasized that limitations on liability resulting from such violations are strongly disfavored. *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1160 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

In sum, ADC did not properly preserve the issue of WOWS indemnification at trial, and a miscarriage of justice will not occur by denying ADC the right to raise this issue at this time. Current law is unlikely to sanction WOWS indemnification, and, in any event, such indemnification would lead to a particularly unjust result given ADC's various omissions, including its failure to obtain a valid certificate for oceangoing operations.

II.

At trial the Court held Moran liable to the government for its share of the United States' oil-spill cleanup expenses under § 1321(g) of the FWPCA. Subsection (g), which the government urged at trial as the appropriate provision, applies only to sole-cause, third (*i.e.* non-

discharging) parties. Moran was held only 65% at fault for the oil spillage in this case and cannot, therefore, be held liable under subsection (g). The only provision under which Moran may be held liable is § 1321(h)(2), which preserves for the government nonstatutory remedies against third parties involved in oil spills. Among the remedies preserved by subsection (h)(2) is the government's right to hold a vessel and its owner jointly and severally liable for negligent oil pollution. *United States v. M/V Big Sam*, 681 F.2d 432, 443, *reh'g denied*, 693 F.2d 451 (5th Cir. 1982) (authorities collected).

The threshold issue with regard to Moran's liability to the United States under § 1321(h)(2) concerns Moran's claim that the question of its liability under FWPCA is "moot". Moran asserts that § 1321 contains a hierarchy of remedies for government recovery of the costs of an oil-spill cleanup. According to Moran's argument, the preferred remedies in this hierarchy are found in § 1321(f) and § 1321(g), which respectively provide for discharger and sole-cause third party strict liability; so long as either of these remedies will afford the United States complete reimbursement, the remedies preserved by subsection (h)(2) should not be employed. Thus, Moran claims, because the government's claim for $235,000 is less than ADC's $300,000 limitation fund under §1321(f), the issue of Moran liability under subsection (h)(2) is "moot".

This claim is negated by the plain language of subsection (h)(2): "The liabilities established by this section *shall in no way* affect any right...the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." 33 U.S.C. § 1321(h)(2) (emphasis added). Moran's reliance on *United States v. Bear*

Marine Services, 509 F.Supp. 710, 716-18 (E.D.La. 1980) is not persuasive. In *Bear Marine,* the District Court carefully described the purposes and provisions of § 1321 in denying a third party's motion to dismiss the government's claim for oil-spill cleanup costs brought under maritime tort doctrines preserved by subsection (h)(2). Although silent as to whether the discharger's limitation fund was less than the government's reimbursement claim, the opinion plausibly asserts that subsection (h)(2)'s preservation of nonstatutory remedies was designed to assure the government an alternative source of reimbursement in the event either of the limited liability remedies provided by subsections (f) or (g) proved inadequate. Language in the opinion further suggests that, in light of this statutory design, only those costs not covered by sources available under subsections (f) or (g) may be recovered under the remedies preserved by subsection (h)(2). *Bear Marine,* 509 F.Supp. at 718-19. Such a limitation on the availability of remedies preserved by subsection (h)(2) should not, however, be read into §1321. Although Congress may have preserved nonstatutory remedies in order to assure full government reimbursement in the event the statutory remedies proved inadequate, Congress did not tailor its preservation of nonstatutory remedies to that purpose. As noted, Congress specifically stated that the statutory remedies "in no way affect" existing nonstatutory remedies against third parties.

Moreover, there is no compelling reason why the nonstatutory remedies preserved by § 1321(h)(2) should be unavailable to the govnment whenever the statutory remedies provided by subsections (f) or (g) are adequate. The United States may prefer to move under subsections (f) or (g) in many cases, inasmuch as those strict-liability provisions do not require proof of negligence; if, however,

as in this case, a determination of negligence has already been made as to a third party, there is no reason not to allow the government to proceed separately against the negligent third party for its share of liability under maritime tort doctrines preserved by subsection (h)(2). Indeed, in this case it seems especially appropriate to allow the government to hold Moran, which was 65% responsible for the oil-spill in question, jointly and severally liable with ADC, which was only 35% responsible for the oil-spill. (Of course, if the government elects to demand reimbursement from either ADC or Moran for more than its share of fault, the party that pays for more than its share of fault will have an action for contribution from the party that pays for less than its share of fault.)

The second issue concerning Moran's liability to the United States under subsection (h)(2) is whether that liability is limited by the tonnage formula expressly provided in subsection (g) for strictly liable, sole-cause third parties. This issue has been recently and very thoroughly explored by the Fifth Circuit in *United States v. M/V Big Sam, supra,* which concluded that a third party's liability for negligence under principles of maritime tort preserved by subsection (h)(2) should not be affected by the limitation provision of subsection (g). Without needlessly repeating the detailed analysis contained in *Big Sam,* the plain language of subsection (h)(2) does not call for a judicial transplant of the limitation on strict liability in subsection (g) to the negligence liability of third parties unrestrictedly preserved by subsection (h)(2). *See Big Sam,* 693 F.2d at 454-56 (discussing recent Supreme Court authority on the need to avoid unnecessarily creative judicial interpretations of unambiguous statutory language). Limiting the liability of all dischargers (subsection (f)), as well as strictly liable, sole-cause third parties (subsection (g)), while not

limiting the liability of negligently liable third parties, is not so illogical or irrational as to require judicial reconstruction of §1321. *See Big Sam*, 693 F.2d at 453 n. 5 & 454 n. 8.

Moran incorrectly suggests that under this reading of the statute it will be held liable without limitation only because it was not the sole cause of the oil-spill and thus did not qualify for liability limitation under subsection (g). *See* Moran Memorandum of Law (Dec. 16, 1982) 18. If the statutory language required such a reading, the language might well be deemed sufficiently illogical and irrational to require judicial reinterpretation. It is difficult to imagine any reason why a negligent party 100% responsible for an oil-spill shouldbe entitled to a liability limitation unavailable to a negligent party 65% at fault. The language of § 1321, however, does not require such a reading. A sole-cause, negligent third party may be held liable without limitation under subsection (h)(2) to the same extent that a contributing-cause, negligent third party may be; indeed, the defendant in *Big Sam* was just such a negligent, sole-cause third party liable under both subsection (g) and subsection (h)(2). *See* 681 F.2d at 442.43.

A final difficulty concerning Moran's liability under § 1321(h)(2) is this Court's original finding that Moran is not a "third party" under § 1321(f). Transcript of Trial 1162. In its appellate brief Moran urged that this finding precluded holding it liable as a "third party" under § 1321(h)(2). Moran Appellate Reply Brief (May 21, 1982) 21. The Court of Appeals noted this apparent anomaly in its statement remanding this case. Moran's briefs on remand to this Court, however, do not mention the argument. This Court's finding concerning Moran's status under § 1321(f) was significant only insofar as ADC could have otherwise

avoided its strict liability as discharger by invoking the exception in subsection (f) for oil spills caused solely by a "third party." The Court's finding concerning ADC's 35% responsibility for the oil spill, however, precluded AdC from avoiding liability under any of the exceptions in subsection (f). In short, the finding that ADC was 35% at fault made the finding that Moran was not a "third party" under § 1321(f) irrelevant. Thus the propriety of inconsistently reading "third party" in different subsections of § 1321 is not at issue here because only the use of the term in subsection (h)(2) is involved.

Moran is undoubtedly a third party under subsection (h)(2). As detailed in opinions by the Fifth and First Circuit, a narrow reading of the sole-cause "third party" exception in § 1321(f) is justified by the statute's purpose of assuring government reimbursement for clean-up costs by holding discharging vessels strictly liable. *See United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787 (5th Cir.) *reh'g denied*, 629 F.2d 1350 (1980), *cert. denied*, 452 U.S. 906 (1981); *Burgess v. M/V Tamano*, 564 F.2d 964, 981-82 (1st Cir. 1977) *cert. denied*, 435 U.S. 941 (1978). This purpose is not served by narrowly construing the reference to "third party" in § 1321(h)(2); rather, a broad construction of the term in subsection (h)(2) serves the purpose of the statute in the same way a narrow reading of the term in subsection (f) does: by providing another source from which the government may attempt to procure reimbursement for clean-up expenses.

III.

In conclusion, ADC may not assert a WOWS claim as a means of avoiding liability for its share of fault, and Moran and the tug *Grace Moran* may be held jointly and

severally liable to the government without limitation under § 1321(h)(2). No costs to any party. The parties are directed to submit a judgment within 10 days incorporating amendments to the Court's previous judgment that are indicated by this Order.

SO ORDERED.

Dated: New York, New York
February 11, 1983

ABRAHAM S. SOFAER
U.S. DISTRICT JUDGE